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Patriarchy and Inequality: Towards a Substantive Feminism

Mary Becker[†]

Today's national movements, women's and blacks, seem more interested in being players in the white male club than challenging the white male patriarchy.

Barbara Neely¹

As we reach the turn of the century, feminism seems to be at an impasse. Young women agree that women should receive equal pay and equal treatment as workers, but many insist that they are not feminists.² Women have made strides in educational institutions and as workers during the current wave of the feminist movement, yet progress now seems to be at a snail's pace.³ Most women continue to do most caretaking and domestic work at home and now also work for wages.⁴ Most men are aware of women's second shift and its unfairness, but are uninterested in

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¹ Barbara Neely, *Blanche Among the Talented Tenth* 189 (Penguin 1994).

² See, for example, Barbara Findlen, *Listen Up: Voices From the Next Feminist Generation* xiv (Seal 1995) (noting that many more "young feminists have integrated feminist values into our lives" than "consider themselves feminist"); Carolyn Sorisio, *A Tale of Two Feminisms: Power and Victimization in Contemporary Feminist Debate* in Leslie Heywood and Jennifer Drake, eds, *Third Wave Agenda: Being Feminist, Doing Feminism* 134, 136 (Minnesota 1997) (noting that the media "continuously" claim that young women have disowned feminism).

³ On the lack of forward momentum in recent years and its causes, see, for example, Susan Faludi, *Backlash: The Undeclared War Against American Women* (Crown 1991); Susan Faludi, *Stiffed: The Betrayal of the American Man* (William Morrow 1999).

⁴ See, for example, Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 Nw U L Rev 1, 8-13 (1996) (reviewing sociological literature on time use and concluding that housework and caretaking are still women's work in most families); Arlie Hochschild, *The Second Shift: Working Parents and the Revolution at Home* (Viking 1989) (study of families with two working parents in San Francisco Bay area and concluding that women work an extra month a year relative to men when housework and caretaking are included).

change.⁵ Media treat women better in some ways, but continue to focus primarily on men and on women in relationship to men.⁶ Most heroines are thin and beautiful. Women, particularly young women, are more obsessed than in earlier eras with weight and physical appearance as measures of merit.⁷ Real equality appears to be an ever-receding chimera.

I suggest that part of the problem is the failure of feminists, particularly feminists working for legal change, to look at the big picture: a social structure that is male-centered, male-identified, male-dominated, and which valorizes qualities narrowly defined as masculine. Neither of the approaches to change dominant in legal circles — liberal feminism and dominance feminism — has the potential to seriously threaten this structure because both are empty at their core, offering no values inconsistent with patriarchal values. Cultural feminism does offer values inconsistent with patriarchal values, but has been widely discredited in legal circles.⁸

In this essay, I outline a variation on cultural feminism I call “relational feminism.” This approach offers benefits to all members of society, not just women. Human beings, whether men, women, or children, do not flourish when hyper-masculinity is glorified and traditionally feminine qualities (such as care, care-taking, and valuing relationships) are denigrated. Nor do human beings flourish when all males are pressured to adopt hyper-masculine attributes and repress feminine ones, and all females are pressured to adopt traditionally feminine attributes and repress masculine ones. Relational feminism has the potential to improve life for many people, not just women.

⁵ See Roberta S. Sigel, *Ambition and Accommodation: How Women View Gender Relations* 167–74 (Chicago 1996).

⁶ See generally Laura Flanders, *Real Majority, Media Minority: The Cost of Sidelining Women in Reporting* (Common Courage 1997) (describing media’s focus on men).

⁷ See Joan Jacobs Brumberg, *The Body Project: An Intimate History of American Girls* (Random House 1997) (documenting the belief of many contemporary girls that their worth depends on “good looks” rather than “good works,” though the latter would have been considered the appropriate measure by most girls during the nineteenth century).

⁸ See, for example, Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* 38–39 (Harvard 1987) (linking ethic of care to women’s subordination); id at 39 (“Women value care because men have valued us according to the care we give them.”); Linda C. McClain, “Atomistic Man” Revisited: *Liberalism, Connection, and Feminist Jurisprudence*, 65 S Cal L Rev 1171, 1196–1202 (1992) (linking ethic of care with women’s adaptation to subordination and offering a number of other criticisms); Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 Stan L Rev 581 (1990) (arguing that both dominance feminism, as exemplified in Catharine MacKinnon’s work, and cultural feminism, as exemplified in Robin West’s work, essentialize women’s experiences in ways that obscure differences of race, class, etc.); Robin West, *Caring for Justice* 10–21 (NYU 1997) (responding to criticisms of essentialism in cultural feminism).

In Part I, I describe the patriarchal social structure that is our core problem. In Part II, I describe the two dominant notions of sex equality in legal circles: formal equality, which dominates analysis in courts, and dominance feminism, which dominates analysis in the legal academy. I explain why neither has the power to challenge patriarchy. In Part III, I define a relational feminist approach in some detail and outline some values, perspectives, and policy changes that could disrupt patriarchal structures. In Part IV, I explore one of these sets of changes — change to the electoral system in the United States — in greater detail. Finally, in Part V, I briefly explain why patriarchy must be challenged politically rather than through a judicially enforced constitutional standard.

I. IT'S THE PATRIARCHY

Social structures and the individuals within them create and reproduce inequalities linked to sex, race, class, religion, ethnicity, and other “differences.”⁹ Individuals living in the United States today are encouraged to believe that (only) white men are fully human; and because (only) white men are fully human, society is organized around their needs, reality is seen from their perspectives, their attributes are seen as most valuable and productive, and they (naturally) dominate politics and culture.¹⁰

Sociologists focus on the social stratification of groups.¹¹ Sociological perspectives on the social structures and forces causing group-based inequalities can help us understand how the legal

⁹ Harold R. Kerbo, *Social Stratification and Inequality: Class Conflict in Historical and Comparative Perspective* 10–14 (WCB/McGraw Hill 3d ed 1996).

¹⁰ See, for example, Susan Moller Okin, *Women in Western Philosophical Thought* (Princeton 1979) (discussing male perspective pervading western philosophy); Susan Moller Okin, *Justice, Gender, and the Family* (Basic Books 1989) (discussing failure of contemporary philosophers concerned with justice to consider justice within the family); Marilyn Frye, *Willful Virgin: Essays in Feminism 1976–1992* 109–19 (1992) (discussing cultural understanding of “having sex” as androcentric, i.e., measured by male orgasms); Marilyn Waring, *If Women Counted: A New Feminist Economics* 33 (Harper 1988) (discussing failure of standard economic measures, such as the United Nations System of National Accounts, which are used to measure production and economic growth throughout most of the world, to value women’s unpaid work within the home); Flanders, *Real Majority* (cited in note 6) (discussing media’s focus on men); Marianne A. Ferber and Julie A. Nelson, eds, *Beyond Economic Man: Feminist Theory and Economics* (Chicago 1993) (discussing male perspective implicit in classical economics); Elizabeth Anderson, *Value in Ethics and Economics* (Harvard 1993) (discussing need to value different goods, including relationships and caretaking); Edith Kuiper and Jolande Sap, eds, *Out of the Margin: Feminist Perspectives on Economics* (Routledge 1995) (discussing the absence of consideration of women in economic thought and the androcentrism of standard economic assumptions and analyses).

¹¹ Kerbo, *Social Stratification* at 3 (cited in note 9).

system should respond. In particular, sociologists (and others) working in the relatively new field of masculinities¹² offer valuable insights for feminists working within the law.¹³

Allan Johnson, a sociologist working in masculinities, calls our male-centered, male-identified, male-dominated social structure “patriarchy” and identifies male distrust and fear of other men as patriarchy’s core motivating force. Patriarchal culture values “control and domination” most, because control and domination of other men ensures one’s own safety from them.¹⁴ In Allan Johnson’s words:

What drives Patriarchy as a system — what fuels competition, aggression, and oppression — is a dynamic relationship between control and fear. Patriarchy encourages men to seek security, status, and other rewards through control; to fear other men’s ability to control and harm them; and to identify being in control as both their best defense against loss and humiliation and the surest route to what they need and desire. In this sense, although we usually think of patriarchy in terms of women and men, it is more about what goes on *among men*. The oppression of women is certainly an important part of patriarchy, but, paradoxically, it may not be the *point* of patriarchy.¹⁵

Although oppression of women is not the point of patriarchy, a social system that is male-identified, male-controlled, male-centered will inevitably value masculinity and masculine traits

¹² On the development of the field over time, see Tim Carrigan, Bob Connell, and John Lee, *Hard and Heavy: Toward a New Sociology of Masculinity* in Michael Kaufman, ed, *Beyond Patriarchy: Essays by Men on Pleasure, Power, and Change* (Oxford 1987) (describing history of discipline from men’s liberation, which tended to claim that men were just as oppressed as women by the current gender system, to contemporary studies in masculinities, which examine how the gender system operates to facilitate male domination and yet harms men as it does so).

¹³ For examples of contemporary work in masculinities, see Allan G. Johnson, *The Gender Knot: Unraveling Our Patriarchal Legacy* 3–23 (Temple 1997) (discussing patriarchy as a complex social system pressuring men and women to be male identified and to accept and expect male control); Kenneth Clatterbaugh, *Are Men Oppressed?*, in Larry May, Robert Strikwerda and Patrick D. Hopkins, eds, *Rethinking Masculinity: Philosophical Explorations in Light of Feminism* 289, 294–97 (Rowman and Littlefield 2d ed 1996) (discussing the core of women’s oppression as denial of full humanity to women); Michael A. Messner, *Power at Play: Sports and the Problem of Masculinity* (Beacon 1992) (critiquing sports from a masculinities perspective); Michael Kaufman, *Cracking the Armour: Power, Pain and the Lives of Men* (Penguin 1994) (analyzing why men do not feel powerful in our patriarchal culture).

¹⁴ Johnson, *Gender Knot* at 28–29 (cited in note 13).

¹⁵ *Id* at 26.

over femininity and feminine traits. In such a system, men (and women) will be encouraged to regard women as beings suited to fulfill male needs.

Other social systems of group-based oppression coexist with sexism in patriarchal structures. Race, ethnicity, religion, class, and many other variables structure inequality. Women, as well as men, are privileged or disadvantaged by their positions along these variables. Women, as well as men, can oppress those in more vulnerable groups. How much privilege a person has depends on the social positions she occupies and how those positions are valued in her society.¹⁶ In contemporary American society, oppressions by race and class are interconnected parts of sexism¹⁷:

[A]ll forms of oppression draw support from common roots, and whatever we do that draws attention to those roots undermines *all* forms of oppression. . . . [I]f we identify the core problem as *any* society organized around principles of control and domination, then changing *that* requires us to pay attention to all of the forms of oppression those principles promote. Whether we begin with race or gender or ethnicity or class, if we name the problem correctly, we'll wind up going in the same general direction.¹⁸

Many forms of group-based inequality are tangled together in a patriarchal culture.

Women's inequality cannot be adequately addressed simply by working to get women "a bigger piece of the pie."¹⁹ If this is all we do, *some* women will succeed. But the women who succeed will be those who are male-centered and male-identified; who conform to patriarchal values; and who do not seriously threaten the patriarchal order.²⁰ Moreover, these women will themselves contribute to the oppression of other races, classes, and ethnicities, and of women who are less male-centered and male-identified and who are therefore more threatening to the status quo.

¹⁶ Id at 176.

¹⁷ Id at 51.

¹⁸ Johnson, *Gender Knot* at 249.

¹⁹ Id.

²⁰ Faludi, *Stiffed* at 605 (cited in note 3) ("While women are still outnumbered in the executive suites, many have risen in the ranks and some have achieved authoritative positions — often only to perpetuate the same transgressions as their male predecessors.").

Although women as well as men are encouraged to adopt patriarchal values and perspectives, patriarchy is not a stable, all-powerful system. Countless opportunities for resistance exist. An individual man can refuse to participate in discussions rating women as "babes" or in terms of body parts. Or he can insist that the point made by a female colleague at a meeting is a good one when others ignore it (until it is made by a man). He can even do his share of the housework, cleaning, and child care. A woman can refuse to interact with male colleagues in flirtatious ways, assuaging male egos. Or she too can insist that a point made by a female colleague at a meeting (and ignored) is an important one.

As this analysis suggests, patriarchy is not stable, but ever-changing in response to resistance. It is also resilient. Patriarchal social structures have been tribal, monarchical, and totalitarian; dictatorial and democratic; nomadic, feudal, capitalist, and socialist; religious and atheistic; primitive and post-modern; tolerant and repressive of pornography.²¹

Feminist legal theory has not focused on the patriarchal social system within which sexism occurs, but on narrower, more manageable issues, such as what standard courts should use to identify sex discrimination.²² If sexism and misogyny are part of a larger set of social forces, it is important to understand the entire structure in order to make significant progress towards a better social order. To further this understanding, I describe American patriarchy in detail, beginning with a discussion of the roles of women and then discussing men and patriarchy.

A. Women in Patriarchy

Although the subjugation of women is not the central dynamic driving patriarchy, patriarchal culture is deeply misogynistic and valorizes masculinity. In such a culture women are seen as less than fully human and as less than trustworthy, particularly when "accusing men of sexual misconduct."²³ Aggression against women is justified by women's choices and natures.

²¹ See, for example, Sherry B. Ortner, *Making Gender: The Politics and Erotics of Culture* (Beacon 1996) (collection of essays by an anthropologist discussing, among other things, the "the universal or near-universal [phenomenon] of male dominance"); see also Michelle Zimbalist Rosaldo and Louise Lamphere, eds, *Woman, Culture, and Society* (Stanford 1974) (collection of essays by sixteen women anthropologists analyzing the place of women in various cultures).

²² See Mary Becker, Cynthia Bowman, and Morrison Torrey, *Cases and Materials on Feminist Jurisprudence: Taking Women Seriously* 50-154 (West 1994).

²³ Johnson, *Gender Knot* at 86 (cited in note 13).

Women play a number of important roles in patriarchal culture, though those roles often vary with race, class, and other "differences." Perhaps most basic is the use of women and femininity to define men and masculinity. Men are men to the extent they are *not* women: masculine, independent, invulnerable, tough, strong, aggressive, powerful, commanding, in control, rational, and non-emotional. "Real women" (that is, middle- or upper-middle-class white women) are dependent, vulnerable, pliant, weak, supportive, nurturing, intuitive, emotional, and empathic. "Real women" and "real men" are essentially different in patriarchal culture.²⁴

A woman can be a trophy, symbolizing and signaling a man's success against and to other men.²⁵ Most men are far from the top of the patriarchal hierarchy of control and power; women are important as consolation prizes, giving men who have little someone over whom they have rights of power and control.²⁶ In patriarchy, women are expected to "take care of men who have been damaged by other men."²⁷ When men fail, as they must, "women are also there to accept the blame and receive men's disappointment, pain, and rage."²⁸

Women assuage male egos, reflecting men back at "twice their natural size."²⁹ Women assure men that they are real men by deferring to them, by allowing them to set the agenda and do most of the talking, and by stroking their egos in countless other ways. In women's eyes, men see themselves as they should be: independent, autonomous, strong, and successful.³⁰ Heterosexual men expect to see only themselves and their own needs reflected back in relationships with individual women.³¹ But it is *not* ultimately women who confirm manhood; in the end, men depend on other men — "coaches, friends, teammates, co-workers, sports figures, fathers, or mentors" — for such assurances.³²

Men use women to bond with each other through shared participation in demeaning and devaluing women.³³ This can be done

²⁴ Id at 35.

²⁵ Id at 34.

²⁶ Faludi, *Stiffed* at 605 (cited in note 3).

²⁷ Johnson, *Gender Knot* at 37 (cited in note 13).

²⁸ Id.

²⁹ Virginia Woolf, *A Room of One's Own* 35 (Hogarth 1929); Sally Cline and Dale Spender, *Reflecting Men at Twice Their Natural Size* (Seaver 1987) (analyzing the ways in which women reflect men back as greater than they actually are).

³⁰ Johnson, *Gender Knot* at 37 (cited in note 13).

³¹ Id at 10.

³² Id at 31.

³³ Id at 34.

through extreme means, such as gang rape, or more subtle ones, such as telling sexist jokes or judging women's bodies or rating them as "babes." Participation in college fraternities, football teams, and other male groups that demean women is basic training for masculinity under patriarchy.³⁴ Even men who don't actively participate in such rituals are complicit: rare is the man who always objects to such camaraderie. Whether active or passive in these all-male groups, men are pressured to adopt demeaning attitudes toward women in order to confirm their membership in the masculine brotherhood.

For many men, women are links to the world of emotions, especially their own. Such links are important because patriarchy teaches men to repress their emotions and hide their vulnerabilities.

[Men] often look to women as a way to ease their sense of emptiness, meaninglessness, and disconnection. However, the patriarchal expectation that "real men" are autonomous and independent sets men up to both want and resent women at the same time.³⁵

Men often envy and resent women's ability to deal with emotions.³⁶ When women are unable to provide the emotional connection men long for (yet resist), men often blame women for being not "loving or sexual enough, of being manipulative, withholding, selfish bitches who deserve to be punished."³⁷

In patriarchy, men are sexual subjects and women objects³⁸: women's sexuality exists to please men. Whether a woman desires sex is often irrelevant to whether she has sex.³⁹ Because patriarchal heterosexuality is "male-dominated, male-identified, and male-centered," it illustrates and teaches general patriarchal principles: it is men's needs and experiences that are important, that count, just as "having sex" is defined by male pleasure and orgasm.⁴⁰

³⁴ Johnson, *Gender Knot* at 111 (cited in note 13).

³⁵ *Id.* at 40.

³⁶ *Id.* at 40-41.

³⁷ *Id.*

³⁸ On the meaning of objectification and when and why it is immoral, see Mary Becker, *Women, Morality and Sexual Orientation*, 8 UCLA Women's L J 165, 191-202 (1998).

³⁹ *Id.* at 191-92. Johnson, *Gender Knot* at 50 (cited in note 13).

⁴⁰ Frye, *Willful Virgin* at 109-19 (cited in note 10) (discussing cultural understanding of "having sex" as androcentric, i.e., measured by male orgasms); Johnson, *Gender Knot* at 130 (same) (cited in note 13).

Women and men become visible and invisible under different conditions in patriarchal culture. Women are invisible when they do something well, such as "raising children into healthy adults or coming up with a brilliant idea at a business meeting."⁴¹ Men, on the other hand, become invisible when their behavior is socially undesirable and might raise questions about the appropriateness of male privilege.⁴² Similar points can be made about visibility and race or class. An African-American man who has committed a violent crime is likely to be quite visible as (yet another) violent *black* man, though not visible as a violent *man*.⁴³

In a patriarchal culture, there is a strong tendency to deny conflicts of interest between women and men despite obvious inequalities in the allocation of responsibilities and scarce resources. For example, Arlie Hochschild has documented the tendency of working parents to deny inequality in their marriages, despite the fact that the women in the families she studied worked the equivalent of an extra month a year.⁴⁴ Because women and men live together in intimate relationships as parents and children or husbands and wives, we are reluctant to admit conflicts of interest.⁴⁵ And it is easy to deny conflicts of interest because patriarchy justifies inequalities and injustices, even violence, in terms of women's choices and defects: if women get what they choose or deserve, we need not worry about conflicts of interest nor that mostly male decisionmakers divide the pie.

As the dominant group, men (still) fear women: women can rebel and retaliate.⁴⁶ This fear, along with guilt, fosters misogyny, a condition which "can be seen as a cultural result of men's potential to feel guilty about women's oppression."⁴⁷ But men love and need women as well, creating a dangerous emotional mix: "When love and need are bound up with fear and envy, hate and resentment, the result is an explosive mixture that can twist our sense of ourselves and one another beyond recognition."⁴⁸ Sadistic pornography and much domestic violence are more understandable

⁴¹ Johnson, *Gender Knot* at 156 (cited in note 13).

⁴² *Id.* at 156.

⁴³ *Id.* at 157.

⁴⁴ Hochschild, *Second Shift* at 33-58 (cited in note 4) (discussing a family in which wife does more than husband but the arrangement is described as "equal" because of her commitment to equality).

⁴⁵ *Id.* at 21; Mary E. Becker, *Politics, Differences and Economic Rights*, 1989 U Chi Legal F 169; Johnson, *Gender Knot* at 21-22 (cited in note 13).

⁴⁶ Johnson, *Gender Knot* at 39-40 (cited in note 13).

⁴⁷ *Id.* 40-41.

⁴⁸ *Id.* at 41.

when one considers how love, need, fear, envy, hate, and resentment combine in the feelings of many men toward women.

B. Men in Patriarchy

Patriarchy is a social structure, not a conspiracy among men. It is not always intentional; men need not intend to oppress women. Men too are subject to the enormous pressures of a social system that creates paths of least resistance consistent with patriarchy, such as going along with the locker room chatter about babes. Men as well as women are damaged by patriarchy. For example, masculine men are hurt when they learn to repress emotions and to deny their needs for connection and intimacy in order to avoid being punished as sissies and to maintain the control necessary to protect themselves from other men.

Although a man can be treated differently from a similarly situated woman (which is sex discrimination as it is defined by our courts), a man cannot be oppressed as a member of the group men in a patriarchal culture because men as a group are not oppressed. To be sure, subgroups of men can be oppressed. For example, feminine and gay men are routinely oppressed as such, as are African-American, Latino, and Asian-American men. And individual men are hurt by patriarchy, as noted in the preceding paragraph. But patriarchy does not oppress men as men.

What of men drafted and required to serve in combat? Such policies *must* oppress men as men. But, as Allan Johnson has noted, "a group cannot oppress itself" unless oppression loses its core meaning and simply becomes synonymous with being harmed.⁴⁹ A group can, of course, "inflict injury on itself, and its members can suffer from their position in society."⁵⁰ But if "oppression" refers to group-based social inequalities, the dominant group in a culture cannot be oppressed as members of that group in that culture. As Allan Johnson puts this point, "[o]ppression is a relation that exists *between groups*, not between groups and society as a whole."⁵¹ Even in war, men are not oppressed *as men*. Individual men are hurt by war, of course, and war does "oppress racial and ethnic minorities and the poor, who are often served up as cannon fodder by privileged classes whose interests war most often serves."⁵² War cannot oppress men as a group (as men),

⁴⁹ Id at 20.

⁵⁰ Johnson, *Gender Knot* at 20.

⁵¹ Id.

⁵² Id.

however, because it does not demean or undermine patriarchal masculinity.⁵³ Instead, war glorifies patriarchal masculinity and supports the ability of men as a group to dominate others.

Although men cannot be oppressed as men in a patriarchal society, men tend *not* to feel privileged.⁵⁴ Part of the explanation is that patriarchal power has become increasingly institutionalized. In pre-capitalist patriarchies, power “was often directly exercised by individual patriarchs. . . .”⁵⁵ In our late capitalist patriarchy, “men collectively exercise power over women, but are themselves as individuals increasingly under the domination of [increasingly institutional] patriarchal powers.”⁵⁶ Most men, even white men, are far from the top of the patriarchal order, particularly at work. Many men are severely oppressed as members of certain racial or class groups. And some of the ways in which men feel less than powerful are attributable to the costs of conforming to patriarchal ideals of manhood, such as basing self-worth on performance, hiding doubts and vulnerabilities, and repressing feelings.⁵⁷ But the fact that many men do not feel privileged does not prove that men are not privileged.

Those with privilege are often oblivious; it is those *without* privilege who are likely to notice.⁵⁸ Privilege is not a pronouncement from on high that “[t]his is my Son, my Beloved, on whom my favour rests; listen to Him.”⁵⁹ As Allan Johnson has noted, “Privilege can be something as simple as being heard and taken seriously when we say something, of being served promptly and courteously in a store or restaurant, or of being free to move around or express an opinion.”⁶⁰ Common courtesy becomes privilege when it is unevenly distributed between groups, elevating some over others.⁶¹

Because patriarchal privileges and the social systems in which they are embedded are flexible, they are not easily dislodged. Indeed, as discussed in the next section, neither of the

⁵³ Id.

⁵⁴ Johnson, *Gender Knot* at 174.

⁵⁵ Harry Brod, *Pornography and the Alienation of Male Sexuality*, in May, Strikwerda and Hopkins, eds, *Rethinking Masculinity* at 237, 245 (cited in note 13).

⁵⁶ Id.

⁵⁷ Johnson, *Gender Knot* at 203–08 (cited in note 13).

⁵⁸ On white privilege, and the tendency of those with privilege to be oblivious to it, see Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women's Studies* in Leslie Bender and Dan Brave-man, eds, *Power, Privilege and Law: A Civil Rights Reader* (West 1995).

⁵⁹ Matthew 17:5 *New English Bible*.

⁶⁰ Johnson, *Gender Knot* at 175 (cited in note 13).

⁶¹ Id.

strands of feminist equality theory dominant in culture, the law, and the legal academy today challenge core patriarchal principles.

II. FEMINIST THEORIES CONSISTENT WITH PATRIARCHY

At the end of the twentieth century, the two most accepted sex equality theories are liberal feminism with its standard of formal equality⁶² and Catharine A. MacKinnon's sex inequality or dominance approach.⁶³ The liberal feminist standard of formal equality dominates cultural understandings of equality as well as the analysis of courts.⁶⁴ MacKinnon's inequality approach has come to dominate discussions of sex equality in the legal academy.⁶⁵ Both theories are, however, empty at their core; neither includes values inconsistent with patriarchy. Therefore, as discussed in greater detail below, neither poses a serious threat to patriarchy.

A. Liberal Feminism

1. *The Theory.*

Liberal feminism assumes that people are autonomous individuals making decisions in their own self-interest in light of their individual preferences.⁶⁶ Human well-being therefore should increase as individuals have more choices. Sexism operates by pressuring or requiring, sometimes by law, individuals to fulfill male and female roles regardless of their individual preferences. The solution to inequality between women and men is to offer

⁶² For an example of a Supreme Court case taking a formal equality approach, written by Ruth Bader Ginsburg, who advocated this approach in the early constitutional sex-discrimination cases, see *United States v Virginia*, 518 US 515 (1996) (female plaintiff wins; Court holds that Virginia Military Institute cannot admit only men). For a description of Ginsburg's work on early cases, see Becker, Bowman, and Torrey, *Feminist Jurisprudence* 27-30 (cited in note 22).

⁶³ For the earliest published articulation of MacKinnon's dominance approach, see Catharine A. MacKinnon, *Sexual Harassment of Working Women* 106-27 (Yale 1979) (using "sex inequality" to describe the dominance approach).

⁶⁴ See note 74.

⁶⁵ See note 94.

⁶⁶ Sylvia Law, *Rethinking Sex and the Constitution*, 132 U Pa L Rev 955, 963-69 (1984) (arguing that, in general, equality consists of ensuring that the same choices are open to women and men); Robin West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 Wis Women's L J 81, 87 (1987) (describing liberal feminism's assumptions); Robin West, *Jurisprudence and Gender*, 55 U Chi L Rev 1, 14 (1988) (same).

individuals the same choices regardless of sex. The legal standard of formal equality is an expression of this solution.

Formal equality requires that similarly situated individuals be treated similarly regardless of their sex or gender.⁶⁷ Formal equality is modeled after the approach developed by the NAACP in the early racial discrimination cases, which culminated in *Brown v Board of Education*.⁶⁸ In these cases, the NAACP argued that the state could not treat members of different races differently by requiring their segregation; to do so was to discriminate on the basis of race in violation of the Equal Protection clause of the Fourteenth Amendment.⁶⁹ By the time the feminist movement began to push seriously for change in the legal system, this standard of racial equality had succeeded in making Jim Crow segregation in the South unconstitutional.⁷⁰

Despite the arguments, even feminist arguments, that might be made in support of *some* traditional sex-specific rules,⁷¹ the contemporary women's movement — at least to the extent that it focused on law — has been dominated by liberal feminists.⁷² These feminists have advocated formal equality and argued that statutes discriminate on the basis of sex by treating similarly situated individuals differently depending on their sex.⁷³

⁶⁷ In this essay, I use these terms interchangeably, though often "sex" is used to refer to some biologic reality whereas gender refers to social construction of differences. I use them interchangeably because sex and gender are inextricably linked in our culture. It is people who are biologically female who are pressured and expected to be "feminine" and people who are biologically male who are pressured and expected to be "masculine."

⁶⁸ 347 US 483 (1954). For a discussion of the historical background, see Becker, Bowman, and Torrey, *Feminist Jurisprudence* at 17–49 (cited in note 22).

⁶⁹ See Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein and Mark V. Tushnet, *Constitutional Law* 518–30 (Aspen 3d ed 1996).

⁷⁰ In addition to *Brown*, see, for example, *Loving v Virginia*, 388 US 1 (1967) (striking down Virginia's ban on interracial marriage, a part of state-enforced racial segregation).

⁷¹ See, for example, Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S Cal Rev L & Women's Stud 133 (1992) (making feminist arguments for a sex-specific standard for child custody at divorce).

⁷² Mary Becker, *The Sixties Shift to Formal Equality and the Courts: An Argument for Pragmatism and Politics*, 40 Wm & Mary L Rev 209 (1998) (discussing conflicting approaches from suffrage through the early 1960s, followed by agreement on a formal equality approach).

⁷³ For discussions of this standard by its proponents, see, for example, Law, 132 U Pa L Rev at 966 (1984) (cited in note 66); Wendy Williams, *The Equality Crises: Some Reflections on Culture, Courts, and Feminism*, 7 Women's Rts L Rep 175 (1982); Wendy Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 NYU Rev L & Soc Change 325 (1984–85); Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U Cin L Rev 1 (1975) (tracing development of sex discrimination decisions); Ruth Bader Ginsburg and Barbara Flagg, *Some Reflections on the Feminist Legal Thought of the 1970s*, 1989 U Chi Legal F 9.

This approach has been adopted by the Supreme Court in its constitutional sex discrimination cases⁷⁴ and also dominates ideas of equality in the general culture.⁷⁵ It is an appealing standard because it is judicially manageable and resonates with the liberal and individualistic traditions so powerful in American culture. When a liberal argument is available — when a woman is denied an employment opportunity available to a similarly situated man, for example — it can be exceedingly appealing.

2. *Consistent With Patriarchy.*

Despite its appeal, formal equality cannot seriously challenge patriarchy. Patriarchy has already adjusted to the requirement of formal equality in most employment contexts and in law.⁷⁶ Yet inequality between women and men has not disappeared. As MacKinnon noted in describing formal equality as androcentric, this standard is male-identified, male-centered.⁷⁷ It can support a male-dominated social structure. One can treat women who meet male standards like men without any serious threat to patriarchy.⁷⁸

Patriarchy readily accommodates some women into positions of power, provided that the women are male-identified, male-centered, and act according to patriarchal values. As Allan Johnson puts this point:

⁷⁴ See Supreme Court cases listed and briefly described in appendix. See also Becker, Bowman, and Torrey, *Feminist Jurisprudence* at 27–49 (cited in note 22) (describing development of the Supreme Court's equality standard in the 1970s).

⁷⁵ *Id.* at 20–49.

⁷⁶ Becker, 40 *Wm & Mary L Rev* at 252 (cited in note 72) (noting that, for example, most employment in the United States is now formally (expressly) open to women on the same terms as men); Becker, *Feminist Jurisprudence* at 23–24, 511–18, 610–11 (cited in note 22) (noting that express distinctions between women and men in law, such as those once common in family law, are now rare); Riva Siegal, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 *Stan L Rev* 1111, 1115–16 (1997) (discussing how status hierarchies survive seemingly effective challenges by developing new justifications; for example, the early-nineteenth century notion that the man is head of the family has been replaced by notions of family privacy that are often similar in effect; in general, explicit rules favoring the dominant group are replaced by rules subtly supporting the dominant group without express distinctions between dominant and non-dominant groups).

⁷⁷ MacKinnon, *Feminism Unmodified* at 42–43 (cited in note 8):

[Formal equality] adopts the point of view of male supremacy on the status of the sexes. Simply by treating the status quo as "the standard," it invisibly and uncritically accepts the arrangements under male supremacy. In this sense, the [liberal] approach is masculinist, although it can be expressed in a female voice.

⁷⁸ See text accompanying notes 19–20.

Thus far, the mainstream women's movement has concentrated on the relatively less threatening aspects of the liberal agenda. The primary goal has been to allow women to do what men do in the ways that men do it, whether in science, the professions, business, or government. The more serious challenges to patriarchy have been silenced, maligned, and misunderstood for reasons that aren't hard to fathom. As difficult as it is to change overtly sexist sensibilities and behavior, it is much harder to raise critical questions about how sexism is embedded in major institutions such as the economy, politics, religion, and the family. It is easier to allow women to assimilate into patriarchal society than to question society itself.⁷⁹

Liberal feminism requires only that women be allowed to advance on the same terms as similar men in patriarchal institutions with patriarchal values.

It is true that formal equality has helped some women attain power and has opened many jobs to women. It may be true that, because of formal equality, women today are better off than they were in the mid-1960s, prior to acceptance of formal equality in many educational and employment settings. But formal equality cannot seriously threaten patriarchy because it neither embraces nor rejects any values; at its core, it is empty.

B. Dominance Feminism

1. *The Theory.*

Since 1979, when Catharine MacKinnon published her first book,⁸⁰ a number of criticisms have been leveled against formal equality. Indeed, an understanding of the problems with formal equality is the starting place for understanding MacKinnon's alternative, the inequality or dominance approach.⁸¹ MacKinnon notes that the liberal approach only affords protection to women when women and men are similarly situated. When women and men are *not* similarly situated — because some difference seems

⁷⁹ Johnson, *Gender Knot* at 13 (cited in note 13).

⁸⁰ MacKinnon, *Sexual Harassment* (cited in note 63).

⁸¹ In her first book, *Sexual Harassment of Working Women*, Catharine A. MacKinnon calls her approach the "sex inequality" approach and formal equality the "sex differences" approach. *Id.* at 106–07, 116. In her 1987 book, she refers to her alternative as the "dominance approach." MacKinnon, *Feminism Unmodified* at 42 (cited in note 8). Others have sometimes called MacKinnon's approach the "caste" approach. See Cass Sunstein, *Words, Conduct, Caste*, 60 U Chi L Rev 795, 836–40 (1993).

relevant — the standard is inapplicable. Thus, formal equality permits distinctions on the basis of any difference perceived as relevant. But the more unequal women and men are, the more differences there will be between them, and the more relevant those differences will seem. Therefore, according to MacKinnon, the greater the sexual inequality in a society, the less the liberal equality standard can do about it.⁸²

As mentioned earlier, MacKinnon also stresses that formal equality, despite its veneer of gender neutrality, is androcentric — centered on male needs and male-defined standards because it only applies when women look like men (and are thus similarly situated).⁸³ Further, formal equality entitles only women who look like men to the rules and practices worked out by and for men.⁸⁴ More specifically, formal equality gives women workers the right to compete with male colleagues with wives under the rules and requirements worked out by and for men with wives. Thus, women attorneys working in a firm requiring 2400 billable hours a year are entitled only to equal treatment under that standard, regardless of the differences between their domestic responsibilities and those of their male colleagues.⁸⁵

The core of discrimination has never been the differential treatment of women and men who are similarly situated, though to be sure that has been a problem for the unusual woman. The core of discrimination, MacKinnon points out, is the systemic translation of differences between women and men into advantages for men and disadvantages for women so that those at the top within each class and race are almost entirely men.⁸⁶ Thus discrimination on the basis of sex — the systematic disadvantaging of women — is *most* likely to be operating when women and men do *not* seem similarly situated, though that is precisely when formal equality drops the ball and stops looking for discrimination.⁸⁷

MacKinnon sees the eroticization of women's subordinate status as *the* major cause of women's inequality: the linchpin of male supremacy.⁸⁸ Thus her theory focuses on how men's power

⁸² MacKinnon, *Sexual Harassment* at 108 (cited in note 63).

⁸³ MacKinnon, *Feminism Unmodified* at 37 (cited in note 8).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ MacKinnon, *Sexual Harassment* at 117 (cited in note 63).

⁸⁷ See note 66.

⁸⁸ See, for example, MacKinnon, *Feminism Unmodified* at 5 (cited in note 8) ("the mainspring of sex inequality is misogyny and the mainspring of misogyny is sexual sadism"). See also Catharine A. MacKinnon, *Toward a Feminist Theory of the State* 3-12

over women is exercised through the construction — for women as well as men — of a sexuality in which what is erotic is what subordinates women to men. By making women's subordination sexy for women as well as men, patriarchy creates a powerful payback for women themselves in their own subordination. As MacKinnon notes: "Sex feeling good may mean that one is enjoying one's subordination; it would not be the first time."⁸⁹

Thus, MacKinnon perceives male domination of women as achieved through sexuality:

Male dominance is sexual. Meaning: men in particular, if not men alone, sexualize hierarchy: gender is one. . . . The male sexual role . . . centers on aggressive intrusion on those with less power. Such acts of dominance are experienced as sexually arousing, as sex itself. They therefore are.

. . . [A] theory of sexuality becomes feminist to the extent it treats sexuality as a construct of male power — defined by men, forced on women, and constitutive in the meaning of gender. Such an approach centers feminism on the perspective of the subordination of women to men as it identifies sex, that is, the sexuality of dominance and submission, as crucial, as fundamental, as on some level definitive, in that process.⁹⁰

MacKinnon points to widespread male sexual abuse of women — of "rape, battery, sexual harassment, sexual abuse of children, prostitution and pornography" — and widespread tolerance of such abuse, as evidence of the accuracy of her claim: that the eroticization of women's inequality, for women as well as for men, is the mainspring of sexual inequality.⁹¹

MacKinnon's bottom line — the prize we need to keep our eyes on — is power.⁹² We need continuously to look for subtle and

(Harvard 1989) (discussing parallel between sexuality for feminism and work for Marxism: "Sexuality is to feminism what work is to Marxism: that which is most one's own, yet most taken away.")

⁸⁹ MacKinnon, *Feminism Unmodified* at 218 (cited in note 8).

⁹⁰ Catharine A. MacKinnon, *Pleasure Under Patriarchy* in James Geer and William O'Donohue, eds, *Theories of Human Sexuality* 65–67 (Plenum 1987).

⁹¹ Id. See also MacKinnon, *Theory of the State* at 3–4 (cited in note 88) (discussing sexuality as "social process through which sexual relations of gender [inequality] are created"); MacKinnon, *Feminism Unmodified* at 5–8 (cited in note 8) (discussing same issue).

⁹² See MacKinnon, *Feminism Unmodified* at 32–45 (cited in note 8). For example, she writes: "I say, give women equal power in social life. Let what we say matter, then we will

not-so-subtle ways in which differences between women and men are turned time after time into advantages (more power) for men and disadvantages (less power) for women. Sex is the core of this phenomena: "sexuality appears as the interactive dynamic of gender as an inequality."⁹³

Although MacKinnon's approach has not been generally adopted by courts, it has been extremely influential in the legal academy.⁹⁴ Women feel the link between contemporary heterosexuality and subordination. And MacKinnon is right in asserting that the cause of inequality is not difference but what we make of difference.

2. *Consistent With Patriarchy.*

Although MacKinnon's analysis contributes important and powerful points in describing how social forces produce inequality between women and men, it too is empty at its core of any values inconsistent with patriarchal values. Ironically, it is also too focused on women (and sexuality). I begin with the last point. Patriarchy is not primarily organized around the interactions of women and men. The core of patriarchy is a battle between men who fear each other for power and control over each other. Because this is its core, patriarchy values power, control, autonomy, independence, toughness, invulnerability, strength, aggressiveness, rationality, detachment (being non-emotional), and other traditionally masculine attributes that have proven effective in the battle against other men.

To be sure, in our culture much heterosexuality and all pornography are part of the patriarchal structure and contribute

discourse on questions of morality. Take your foot off our necks, then we will hear in what tongue women speak." Id at 45.

⁹³ Id at 6.

⁹⁴ See, for example, the prominent placement of MacKinnon's ideas and works in these feminist textbooks and readers: Beverly Balos and Mary Louise Fellows, *Law and Violence Against Women: Cases and Materials on Systems of Oppression* 138, 144-45, 281, 322-23, 486, 487-91, 620-31 (Carolina 1994); Katharine Bartlett and Angela Harris, *Gender and Law: Theory, Doctrine, Commentary* 404-05, 410, 490-96, 516, 630-33, 651-56, 711, 723-24, 737, 825-26, 833, 841, 851, 882-83, 870, 1015-21, 1053 (Aspen 2d ed 1998); Becker, Bowman, and Torrey, *Feminist Jurisprudence* at 34, 50, 51, 52-57, 63, 68-81, 109, 127-29, 146, 150-51, 153, 155, 156-62, 171, 173, 218-19, 262, 321-34, 339, 340, 343, 389-91, 397, 407-08, 428, 479, 629, 737, 748, 805, 855, 887 (cited in note 22); Judith Greenberg, Martha Minow, and Dorothy Roberts, *Women and the Law* 83-91, 737-42, 866-75 (Foundation 1998); D. Kelly Weisberg, ed, *Feminist Legal Theory: Foundation* 276-87, 427-53 (Temple 1993); D. Kelly Weisberg, ed, *Sex, Violence, Work and Reproduction: Applications of Feminist Legal Theory to Women's Lives* 37-79, 985-94 (Temple 1996); Frances Olsen, ed, *Feminist Legal Theory: Foundations and Outlooks* 53-106 (NYU 1995).

powerfully to the subordinate status of women.⁹⁵ But sexual access to women on men's terms is not the driving force behind patriarchy. The driving force is men's fear of other men and their need to achieve power and control to avoid domination by other men.

More fundamentally, MacKinnon offers no alternative to patriarchal values. Indeed, her bottom line and key value — power — is a core patriarchal value. Simply seeking more power (as it is currently and patriarchally defined) for women need not threaten patriarchy in the short run. If all that happens in the next ten years is that more male-identified and male-centered women get more power in patriarchal institutions, most women are likely to be no better off than they are today.

If we could jump into an ideal world without any transition, jump into a world in which women had as much power as men (for example, a world in which 50 percent of those in the Senate, the House of Representatives, the Supreme Court, and the Cabinet were suddenly women), MacKinnon's solution might work. All those women with power would then be able to reward qualities other than those associated with masculinity, and might well do so. But MacKinnon's approach is not a blueprint for getting to such a world because, in the short term, giving more power only to *a few* women — those who rise within patriarchal institutions — will not challenge patriarchy.⁹⁶

Feminist theories dominating legal thinking cannot deliver equality for ordinary women who tend to have primary-caretaking responsibilities and to work in women's jobs because they offer no challenge to patriarchal values. An approach with more potential will have to offer values inconsistent with patriarchal values, values which challenge the patriarchal obsession with autonomy, independence, control and power over others. To date, the only strand of feminist theory with such potential is cultural feminism, which has been widely disparaged in the legal academy and other law-related circles. In the next section, I attempt to define a version of cultural feminism incorporating in-

⁹⁵ See, for example, Diana Russell, *Against Pornography: The Evidence of Harm* (Russell Publications 1993) (describing evidence of harm and giving examples of pornography that is often shockingly sadistic); Andrea Dworkin, *Woman Hating* (E.P. Dutton 1974) (analyzing misogyny and racial hatred in pornography); Becker, Bowman, and Torrey, *Feminist Jurisprudence* at 317–21 (cited in note 22) (discussing evidence linking pornography to child abuse and violence against women).

⁹⁶ See note 20.

sights from scholars working in the field of masculinities. I use the term "relational feminism" to describe this approach.

III. RELATIONAL FEMINISM

Cultural feminism is often traced to Carol Gilligan's book, *In a Different Voice*.⁹⁷ In that book, Gilligan discusses two different methods for resolving moral dilemmas: one associated with masculinity and applying a hierarchy of rules and principles to resolve moral conflicts, the other associated with femininity and resolving such conflicts so as to preserve and protect relationships.⁹⁸ Gilligan sees these voices as connected to differences in gender identity for women and men, with male identity grounded in separation and individuation from others and female identity grounded in relationships.⁹⁹ Gilligan notes that moral theorists had ignored this latter voice and assumed that moral maturity demands the masculine approach. Gilligan argues for recognizing and valuing the "other" voice in order to "arrive at a more complex rendition of human experience which sees the truth of separation and attachment in the lives of women and men and recognizes how these truths are carried by different modes of language and thought."¹⁰⁰

Gilligan's work is controversial on a number of levels¹⁰¹ and condemned by many as "essentialist," that is, viewing women and men as essentially (biologically) different rather than recognizing the many social forces connected to any observable difference along the lines she describes.¹⁰² MacKinnon, for example, notes that women value care because men value women for the care they give men.¹⁰³ Yet Gilligan's stress on the importance of relationships, care, and connection to women and the need to value such commitments and relationships resonates with many women. The term "cultural feminism" is used to describe the work of Gilligan and others stressing the need to place greater

⁹⁷ Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard 1982).

⁹⁸ *Id.* at 24-39.

⁹⁹ *Id.* at 8.

¹⁰⁰ *Id.* at 173-74.

¹⁰¹ See Becker, Bowman, and Torrey, *Feminist Jurisprudence* at 63-64 (cited in note 22).

¹⁰² For an excellent discussion of the charge of essentialism and the need to pursue such discussions, see Robin West, *Caring* at 10-17 (cited in note 8).

¹⁰³ MacKinnon, *Feminism Unmodified* at 39 (cited in note 8).

value on the traditionally feminine values of care and relationships.¹⁰⁴

Robin West has developed the most thorough application of cultural feminism in legal contexts. Her first important cultural feminist piece is an article on women's hedonic lives.¹⁰⁵ West begins by observing that women's suffering (and pleasure) is dismissed or trivialized by the legal system.¹⁰⁶ Part of the problem is that women have difficulty describing and communicating their pleasures and pains because these are often different from men's. For example, "date rape" and "sexual harassment" are oxymorons capturing women and men's conflicting experiences of the same event. For him it was a date; for her it was rape. For him it was sexual; for her it was harassment.

West identifies an important assumption about human nature shared by both MacKinnon's dominance approach and liberal equality. Both assume that women's well-being can and should be pursued indirectly, by seeking other ends. For MacKinnon, the end is more power, with the assumption that if women have more power, women will be better off. For liberals, the end is more choices, with the assumption that if individual women have more choices, women will be better off.¹⁰⁷ Both these approaches accept "the Kantian assumption that *to be human* is to be in some sense autonomous — meaning, minimally, to be differentiated, or individuated, from the rest of social life."¹⁰⁸ But women might be less autonomous and more relational than men. Physical and social experiences of heterosexual intercourse, pregnancy and mothering tend to make women less autonomous and more interdependent than men.¹⁰⁹ Each of these experiences connects women to others in a way without precise parallel for men. Even heterosexual intercourse, an experience shared by women and men, differs on a physical level as well as in terms of its social meaning. Women, as the penetrated, may more palpably feel

¹⁰⁴ For academic literature continuing in this tradition, see, for example, Nel Nodding, *Caring: A Feminine Approach to Ethics and Moral Education* (California 1984); Sara Ruddick, *Maternal Thinking: Toward a Politics of Peace* (Beacon 1989).

¹⁰⁵ West, 3 *Wis Women's L J* at 81 (cited in note 66). For an example of feminist work by a woman of color stressing caring as a culturally African value, see Patricia Hill Collins, *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment* 215–19 (Unwin Hyman 1990). Collins also uses "concrete experience as a criterion of meaning," rather than abstract principles. *Id.* at 208–12.

¹⁰⁶ Allan Johnson also stresses the differences in the ways women and men suffer under patriarchy. Johnson, *Gender Knot* at 20 (cited in note 13).

¹⁰⁷ West, 3 *Wis Women's L J* at 141 (cited in note 66).

¹⁰⁸ *Id.* at 140.

¹⁰⁹ *Id.* at 140–41.

the connection to the other as the essence of the experience.¹¹⁰ Thus, West notes, both liberal and dominance feminism are “assimilationist” in an important sense: both assume that human nature is the same for women and men and that greater autonomy, as men have defined it, will make women better off.¹¹¹ The ends sought by both the liberal and the dominance approaches to inequality between the sexes — choice (sought by liberals to further autonomy) and power (sought by dominance theorists to further autonomy) — may be more appropriate for men than for women.¹¹²

West agrees with MacKinnon that power *is* important. Indeed, West sees increased power as generally beneficial for women and consistent with improvement in women’s lives.¹¹³ West argues, however, that power should not be the only focus, particularly when there is a conflict between seeking power and seeking pleasure or the avoidance of pain in women’s lives as actually lived.¹¹⁴ West proposes that we adopt

a critical legal method which aims directly for women’s subjective well-being, rather than indirectly through a gauze of definitional presuppositions about the nature of human life which almost invariably exclude women’s lives. We should aim, simply, to increase women’s happiness, joy and pleasure, and to lessen women’s suffering, misery and pain.¹¹⁵

Any direct focus on women’s felt pleasures and pains requires, as West herself notes, that we distinguish between accurate reports and “lies,” since “women have a seemingly endless capacity to lie, both to ourselves and others, about what gives us pain and what gives us pleasure.”¹¹⁶ Indeed, under conditions of inequality, West stresses, women often define themselves as those who give what

¹¹⁰ Although West does not make this point, part of the difference may be that for men it seems likely that orgasm and ejaculation (rather than connection) may be key aspects of heterosexual intercourse whereas women do not ordinarily experience orgasm as the result of heterosexual intercourse alone. See, for example, Alix Shulman, *Organs and Orgasms* in Vivian Gornick and Barbara K. Moran, eds, *Women in Sexist Society: Studies in Power and Powerlessness* 292 (Basic Books 1971).

¹¹¹ West, 3 *Wis Women’s L J* at 87–89 (cited in note 66).

¹¹² *Id* at 141.

¹¹³ *Id* at 116.

¹¹⁴ *Id* at 116.

¹¹⁵ West, 3 *Wis Women’s L J* at 142 (cited in note 66).

¹¹⁶ *Id* at 144.

others might otherwise take.¹¹⁷ A direct focus on women's felt experience is, therefore, not without danger. But West sees no viable alternative.¹¹⁸ Only by trying to speak the truth about their inner lives can women begin to develop "a description of human nature" which is true for women's actual lives as lived.¹¹⁹

In her recent book *Caring for Justice*,¹²⁰ Robin West argues that *justice* or some attribute of justice such as institutional consistency, personal integrity, or impartiality, and *care* are *both* required for moral decisionmaking.¹²¹ In using the word "care," West begins with the nurture of individuals: "When we nurture, we nurture particular persons, not groups, nations, or species, and when we nurture a particular person, we seek to make that person as fulfilled as possible."¹²² The "circle of care" can also extend to groups and be the basis egalitarian social order based on "a sense of brotherhood and sisterhood" rather than on "an abstract and bloodless zeal for consistency."¹²³

Progressive social programs, such as "wealth redistribution, progressive taxation, welfare programs, or subsistence rights," can be based on empathy with those in need.¹²⁴ Empathy can be the basis for "a commitment to egalitarianism, albeit grounded in shared fellow feeling rather than in principle."¹²⁵ West concludes that "[o]f the two commitments" to egalitarianism, "one from principle" (an abstract commitment to equality for those similarly situated) and "one from fellow feeling" (an empathy-based commitment to help those in need), the commitment based on empathy may "prove to be the more enduring."¹²⁶

A commitment to nurture based on needs, empathy, and feeling may also be less empty than a commitment to equality, West notes. An abstract commitment to equality, understood as treating similarly those similarly situated, will do little to help eliminate real social inequalities, since those who are unequal (the rich and the poor, the abled and the disabled, women who are caretakers as well as workers and men who are primarily

¹¹⁷ Id at 108–11.

¹¹⁸ Id at 144.

¹¹⁹ West, 3 Wis Women's L J at 144 (cited in note 66).

¹²⁰ West, *Caring* (cited in note 8).

¹²¹ Id at 88.

¹²² Id at 69. See also LaFollette, *Rethinking Masculinity* at 119 (cited in note 13) (arguing that women and men in intimate relationships should think in terms of needs and care rather than rights and equality).

¹²³ West, *Caring* at 72 (cited in note 8).

¹²⁴ Id.

¹²⁵ Id.

¹²⁶ Id.

workers) are not similarly situated. On the other hand, a commitment to help those in need can translate into the obligation of those who are best off to help those in far-different circumstances because of "shared fellow feeling." To the extent such empathy actually exists, there will be a commitment to doing something despite, indeed because of, differences.

Increasingly, others besides Gilligan, West, and cultural feminists stress the importance of care and commitment to those in need and the link between these values and equality for women. Recall Allan Johnson, the sociologist working in masculinities whose work was discussed above.¹²⁷ Johnson characterizes our culture's insistence that people are separate and autonomous rather than fundamentally relational as patriarchy's "Great Lie."¹²⁸

From a postsocialist perspective, political scientist Nancy Fraser has developed a similar "politics of need interpretation."¹²⁹ Fraser identifies two forms of injustice: socioeconomic injustice, requiring redistribution of assets, and cultural injustice.¹³⁰ Cultural injustice

is rooted in social patterns of representation, interpretation, and communication. Examples include cultural domination (being subjected to patterns of interpretation and communication that are associated with another culture and are alien and/or hostile to one's own); nonrecognition (being rendered invisible by means of the authoritative representational, communicative, and interpretative practices of one's culture); and disrespect (being routinely maligned or disparaged in stereotypic public cultural representations and/or in everyday life interactions).¹³¹

Fraser sees these forms of injustice as intertwined (though analytically distinct): "Both are rooted in processes and practices that systematically disadvantage some groups of people vis-à-vis oth-

¹²⁷ See notes 14–19 and accompanying text.

¹²⁸ Johnson, *Gender Knot* at 30 (cited in note 13).

¹²⁹ I thank Maud Schaafsma for pointing out to me the similarity between Fraser's politics of need interpretation and an earlier draft of this essay.

¹³⁰ Nancy Fraser, *Justice Interruptus: Critical Reflections on the "Postsocialist Condition"* 13–14 (Routledge 1997).

¹³¹ *Id.* at 14.

ers.¹³² Both require remedies. Socioeconomic injustice calls for “political-economic restructuring.”¹³³ Culture injustice calls for

some sort of cultural or symbolic change. This could involve upwardly revaluing disrespected identities and the cultural products of maligned groups. It could also involve recognizing and positively valorizing cultural diversity. More radically still, it could involve the wholesale transformation of societal patterns of representation, interpretation, and communication in ways that would change *everyone's* sense of self.¹³⁴

Fraser concludes that “[t]he key to achieving gender equity in a postindustrial welfare state . . . is to make women’s current life-patterns the norm for everyone,” which requires far increased valuation of caretaking, accommodation of the caretakers’ needs in employment settings, and breaking the link between sex and gender roles.¹³⁵

Philosopher Eva Kittay also takes a similar approach in her 1999 book. Kittay begins with the proposition that “[h]ow a social order organizes care of [dependents’] needs is a matter of social justice.”¹³⁶ Kittay believes that “[e]quality-based policies have failed women in the public arena as well as in the private sphere, neither achieving their goal in representation in political office nor in sharing of domestic chores and child-rearing responsibilities.”¹³⁷ Kittay, like Johnson, emphasizes that we are not “free and independent equals,” but rather begin and, if we are lucky enough to live so long, end as beings necessarily dependent on others.¹³⁸ Kittay argues that “equality will continue to elude us until we take seriously the fact of human dependency and the role of women in tending to dependent persons.”¹³⁹

In her just-published book, Susan Faludi also emphasizes the necessity of challenging cultural values and our narrow notion of masculinity, both increasingly controlled by corporate marketing in a consumer culture gone awry.¹⁴⁰ In an interview about her

¹³² Id at 14–15.

¹³³ Id at 15.

¹³⁴ Fraser, *Justice Interruptus* at 15 (cited in note 130) (footnote omitted).

¹³⁵ Id at 61.

¹³⁶ Eva Feder Kittay, *Love’s Labor: Essays on Women, Equality, and Dependency* 1 (Routledge 1999).

¹³⁷ Id at 3.

¹³⁸ Id at 4.

¹³⁹ Id.

¹⁴⁰ Faludi, *Stiffed* at 603–05 (cited in note 3).

new book, Faludi describes the women's movement — with its emphasis on importance of caring, involved, fathers — as “the only movement going counter to the commercial culture that's saying, ‘No, your manhood is going to be measured by how much you make, consume, and show off.’”¹⁴¹

There are, I believe, important similarities between the relational feminism I describe and recent work by many other writers, including Johnson (and other writers in masculinities), West, Kittay, Fraser, and, to some extent, Faludi.¹⁴² We are seeing the emergence of a new substantive feminism — a feminism with non-patriarchal values — that is more responsive to the situation we face today than the established feminist approaches of formal equality and dominance feminism.

In Table A, which follows, I identify some of the major differences I see between these three theories — formal equality, dominance feminism, and relational feminism.

Table A

Theory	Formal Equality	Dominance Feminism	Relational Feminism
Proponents	U.S. Supreme Court, Ruth Bader Ginsburg, Sylvia Law, Wendy Williams.	Catharine MacKinnon.	Mary Becker, Allan Johnson, Nancy Fraser, Eva Kittay, Robin West. ¹⁴³
Equality Principle	Women and men are similarly situated and treated identically.	Women and men have equal power.	Women and men have equal chances for human fulfillment and happiness.

¹⁴¹ *This Time, a 'Backlash' for Guys*, Newsweek 59 (Sept 13, 1999).

¹⁴² Faludi's analysis is consistent with a relational feminist approach in that she emphasizes the need for cultural change, the harm done to men by our narrow notion of masculinity, and the pressure on men to conform to masculine standards. She tends not to notice, however, the advantages men, even working-class men, gain — particularly vis-à-vis women — by conforming to the requirements of masculinity. See generally Faludi, *Stiffed* (cited in note 3)

¹⁴³ I do not know whether Johnson, Fraser, or Kittay would place themselves in the relational feminism column.

Theory	Formal Equality	Dominance Feminism	Relational Feminism
Targeted Inequalities	Not treating similarly situated women & men identically (that is, not allowing both women and men to be soldiers)	What society makes of differences (that is, soldiers and vets are rewarded more than mothers and have more power).	<ol style="list-style-type: none"> 1. Cultural <i>over</i>valuation of masculine qualities and <i>under</i>-valuation of feminine qualities. 2. Cultural focus on men and male needs with the tendency not to see women as fully human and to be oblivious to women's needs. 3. Insistence that men and women are essentially different and that men play masculine roles and women play feminine roles.
Fundamental Problem	Individual women and men are pressured into feminine and masculine roles irrespective of individual interests and abilities.	Eroticization of hierarchy and male dominance.	Men's fear that they will be dominated and controlled by other men.
Ideal World	Individual women and men have the same choices.	Women and men have equal power.	<ol style="list-style-type: none"> 1. Women and men have equal chances for human fulfillment and happiness. 2. Valuable traits are valued whether masculine or feminine and whether displayed by women or men.
Values	Liberal values of individual autonomy and choice.	Power as defined today.	Community, relationships, and traditionally feminine qualities should be valued more and traditionally male qualities should be valued less.

Theory	Formal Equality	Dominance Feminism	Relational Feminism
Strengths	<ol style="list-style-type: none"> 1. This standard is judicially manageable; judges can enforce. 2. Formal equality arguments can be very compelling because consistent with American liberalism and individualism. 	<p>This standard focuses on important ways in which sex discrimination operates differently for women and men, particularly the unequal distribution of power and social status.</p>	<ol style="list-style-type: none"> 1. This standard looks at the broad social forces that create inequalities of many kinds. 2. This approach is not essentialist — does not assume that all men are masculine and all women feminine. Nor does it view (all) women as innocent victims. 3. This approach challenges cultural values that generate inequalities.
Weaknesses	<ol style="list-style-type: none"> 1. Works only for women who are similarly situated to men. 2. Helps elite women most because their resumes look most like mens'. 	<ol style="list-style-type: none"> 1. Handles a narrow range of issues because too focused on sexuality. Ignores, e.g., women's roles as mothers. 2. Assumes that women need and want what men want (power as it has been defined). 3. Essentialist: sees women and men the same regardless of race or class; sees women as innocent. 4. Not judicially manageable. 	<ol style="list-style-type: none"> 1. Not judicially manageable. 2. Complex.

Relational feminism does not reject either the equal treatment of similarly-situated women and men (formal equality's focus) nor more power as it is currently defined (dominance feminism's focus). But relational equality has a different focus: working for human happiness and fulfillment for women (and men). Similar treatment of similarly-situated women and men is often appropriate from this perspective. And giving more power, as it is currently described, to women is often appropriate. All else being

equal, it is good (conducive to human happiness and fulfillment) for similar individuals to be treated similarly regardless of sex and good for women to have as much power, as it is currently defined, as men.

Sometimes, however, all is not otherwise equal, and other goods may be more important for women than either of these. If, for example, individual decisionmakers unconsciously prefer men because of patriarchal biases, a rule mandating formally equal treatment of women and men may be inappropriate. Or there may be instances in which something may be more important than power for women's happiness and fulfillment.

More importantly, one's focuses determine one's agenda and priorities. A focus on formal equality will produce a quite different agenda with quite different priorities from an anti-subordination focus. Similarly, a relational feminism focus will produce a quite different agenda with quite different priorities from either of the others. For example, the need to value care-taking and relationships, particularly with dependents, will be high on a relational feminism agenda, and might not even appear on a formal equality¹⁴⁴ or anti-subordination¹⁴⁵ agenda.

To date, cultural feminism is the only strand of feminist theory with values that are incompatible with patriarchal values. Cultural feminism has, therefore, the potential to challenge patriarchy. In the remainder of this section, I first identify four basic values or perspectives grounded in cultural feminism and challenging core patriarchal values or norms, and then identify ten sets of policy changes associated with these values, though I could easily list a hundred more.

¹⁴⁴ For an example of a formal equality feminist who would oppose changes along these lines, see Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U Cin L Rev 1, 80, 85 (1987) (suggesting withdrawal of legal supports for caretakers to encourage women not to make choices within marriage that may prove economically disabling).

¹⁴⁵ MacKinnon does not mention the need for this sort of change in any of her books to date. See *Working Women* (cited in note 63); *Feminism Unmodified* (cited in note 8); *Theory of the State* (cited in note 88); Catharine MacKinnon, *Only Words* (Harvard 1993).

A. Values and Perspectives

1. *Recognize that We Share a Responsibility to Care and Nurture Others and to Value the Relationships and Caretaking of Others.*

As noted earlier, Allan Johnson characterizes our culture's insistence that people are separate and autonomous rather than fundamentally relational as patriarchy's "Great Lie."¹⁴⁶ To counter this lie, we must insist on the value of just and caring relationships and of caretaking, with particular emphasis on the need to ensure the economic well-being of dependents' caretakers.¹⁴⁷

2. *Appreciate that Women and Men Sometimes Have Conflicting Interests and Value Policies Serving Women's Needs When Different From Men's.*

Because a patriarchal society is male-centered and male-identified, men's needs tend to dominate the agenda. In addition, patriarchy denies any conflicts of interest between women and men. An explicit focus on women's needs and how to meet them is necessary and threatening to patriarchy.¹⁴⁸ Such a focus is necessary because a patriarchal culture's consideration of human needs will inevitably and even unintentionally focus on male needs and perspectives. A woman-centered focus will threaten patriarchy because it places women's needs at the center, an activity inconsistent with patriarchy's androcentrism.

3. *Value Female Sexual Agency.*

Patriarchy denies that women can be sexual agents making moral decisions in light of their own sexual desires. Patriarchy teaches that a woman should agree to sex with "her" man when he desires it regardless of whether she desires it or is likely to find it pleasurable.¹⁴⁹ As beings with their own ends and purposes, women should be encouraged to develop as sexual agents,

¹⁴⁶ See note 128 and accompanying text. See also Nedelsky, *Reconceiving Autonomy*, 1 Yale J L & Feminism (1989); West, 55 U Chi L Rev 1 (cited in note 66).

¹⁴⁷ See also Kittay, *Love's Labor* (cited in note 136) (arguing that policies supporting and nurturing dependents' caretakers are key to equality for women).

¹⁴⁸ Johnson, *Gender Knot* at 20 (cited in note 13). On caring as an essential aspect of justice, see West, *Caring* (cited in note 8).

¹⁴⁹ Becker, 8 UCLA Women's L J at 191-202 (cited in note 38); West, 3 Wis Women's L J at 142-45 (cited in note 66); Johnson, *Gender Knot* at 149 (cited in note 13).

capable of saying “no” to sex they do not desire and of seeking their own sexual pleasures.¹⁵⁰

4. *Value Qualities That Are Valuable Regardless of Whether They Are Displayed by a Woman or a Man.*

Because patriarchy rests on the belief that women and men are essentially different, patriarchy values and rewards women and men for conforming to gender stereotypes. For example, in custody disputes, many courts consider economic stability as a reason for awarding custody to the father, who has been the primary breadwinner throughout the marriage.¹⁵¹ In contrast, mothers who have worked for wages throughout the marriage, most of whom have also been primary caretakers of the children, often lose custody because they work outside the home.¹⁵² It is important to break the link between sex and valuation.¹⁵³

B. Policy Changes

1. *Provide Better Emotional and Economic Security for Caretakers and Dependents.*

We all begin and (if we are lucky) end our lives dependent on caretakers, and it is overwhelmingly women who do this essential (unpaid or poorly paid) work. Until we do a better job of meeting the needs of dependents' caretakers, women will not enjoy equality in any meaningful sense.¹⁵⁴

¹⁵⁰ See Becker, 8 UCLA Women's L J at 193–204 (cited in note 38) (discussing what sexual autonomy should mean for women).

¹⁵¹ 46.5 percent of family law judges surveyed in an ABA study regarded economic stability as a prime factor in custody determinations under the best interest standard. Thomas J. Reidy, et al, *Child Custody Decisions: A Survey of Judges*, 23 Fam L Q 75 (1989). See also Becker, 1 S Cal L & Women's Stud at 178 (1992) (cited in note 71) (discussing bias in favor of breadwinning fathers).

¹⁵² D. Kelly Weisberg and Susan Frelich Appleton, *Modern Family Law: Cases and Materials* 832–40 (Aspen 1998) (providing examples and discussing bias against working mothers); Becker, 1 S Cal L & Women's Stud at 177–78 (cited in note 71) (discussing bias against working mothers).

¹⁵³ At the same time, however, we must recognize that men and women engaged in the same activity become visible and invisible under different conditions. See notes 41–43 and accompanying text. Women tend to become invisible when engaged in valuable traditionally female tasks, such as raising healthy children. Men engaged in such activities tend to be extremely visible. Women who are less than perfect mothers are easily seen as bad if not evil. Men who fail to be ideal fathers are often seen as exceptional, excellent fathers; men who abuse their own children often become visible. In thinking about systemic changes to recognize the value of caretaking regardless of the sex of the caretaker, for example, we must realize discretionary comparisons of individual women and men as caretakers are likely to be heavily biased against women and in favor of men.

¹⁵⁴ For an excellent discussion of the points made in this paragraph, see Kittay, *Love's Labor* at 1–19 (cited in note 136).

In particular, we need better emotional and economic protection of caretakers within and after marriage and good support systems for those caretaking outside of marriage.¹⁵⁵ At divorce, most women (and children) suffer a significant decline in their standard of living relative to divorced men.¹⁵⁶ In addition, the strong emotional relationships most women have with their children at divorce — because they have been primary caretakers, whether or not working for wages — are not adequately protected under current custody standards,¹⁵⁷ though most children's interests would be served best by living with the person who has, throughout the marriage, been their primary caretaker.¹⁵⁸

Since 1960, the proportion of children living in mother-only families has increased sharply along with poverty rates and economic insecurity for such families.¹⁵⁹ With the replacement of Aid to Families with Dependent Children by Temporary Assistance to Needy Families, many poor mothers and their children will be even worse off than in the past.¹⁶⁰ Recognizing that we are not independent autonomous actors as well as empathizing with the needs of dependents and their caretakers would support many

¹⁵⁵ Providing better economic security and other protections to caretakers might, of course, increase women's willingness to play their traditional caretaking role in families. At times, some feminists have argued against extending such protections for this reason. See, for example, Kay, 56 U Cin L Rev at 80, 85 (cited in note 144) (suggesting withdrawal of legal supports for caretakers to encourage women not to make choices within marriage that may prove economically disabling). But, as discussed earlier, any effective assault on patriarchy must challenge patriarchal values, particularly the devaluation of caretaking and human connection. Forcing women into the wage-labor market will not in and of itself threaten patriarchy.

¹⁵⁶ See, for example, Weisberg, *Modern Family Law* at 650–52 (cited in note 152) (describing a number of studies in footnotes and text); Becker, 1 S Cal L & Women's Stud at 214–15 (cited in note 71) (discussing post-divorce economic situations of women and children vis-à-vis men).

¹⁵⁷ For criticisms of current custody standards for failing to protect children's strongest emotional bonds at divorce (typically with their mothers), see, for example, Becker, 1 S Cal L & Women's Stud at 133 (cited in note 71); Martha A. Fineman, *The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies* 82–83 (Routledge 1995).

¹⁵⁸ Often, the effect of failing to have a custody standard protecting children's strongest emotional relationships is not that children live with fathers who have not been caretakers, but that mothers trade economic security after divorce for custody. See, for example, Becker, 1 S Cal L & Women's Stud at 214–15 (cited in note 71).

¹⁵⁹ See, for example, Irwin Garfinkel, Sara S. McLanahan and Philip K. Robins, eds, *Child Support and Child Well-Being: What Have We Learned in Child Support and Child Well-Being 1* (Urban Institute 1994). See also *Statistical Abstract of the United States 1998: The National Data Book* 752 (US GPO 1998) (reporting that the poor are disproportionately children).

¹⁶⁰ Temporary Assistance for Needy Families was created by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub L No 104-193, 110 Stat 2105 (1996). For a discussion of the failure of "welfare reform" to adequately care for caretakers of dependents, see Kittay, *Love's Labor* at 117–33 (cited in note 136).

policy changes, including universal health care and better support systems for dependents and their caretakers.¹⁶¹

2. *Facilitate the Ability of Human Beings to Combine Caretaking and Wage Labor.*

Countless changes are needed to make it easier to combine caretaking and wage labor and to ensure adequate income and health insurance for all workers, including those who work only part time in the wage labor market because of their caretaking responsibilities. We need paid parental leave at child birth for at least six weeks¹⁶² (perhaps as part of the unemployment insurance system¹⁶³); a certain number of days of paid caretaking leave each year to be used for parent-teacher conferences, doctor's appointments, illnesses, school plays, etc. (again, this could be folded into the unemployment insurance system); and free quality child care and family health insurance for working families with low or middle incomes.¹⁶⁴

As women have entered the workforce in increasing numbers, the number of hours Americans work has risen year by year. An American worker works more hours per year today than forty years ago.¹⁶⁵ This is true for workers in all groups: women, men,

¹⁶¹ In a 1996 book, sociologist Barbara Bergman discusses French policies that effectively reduce the number of poor French children (5.7 percent) far below U.S. levels (21 percent), though prior to considering the effects of taxes and benefits, levels are about the same (21 percent in France, 24.7 percent in the U.S.). French policies include family allowances (money paid to most families with children), child support assurance (the government pays child support if it cannot be collected from the noncustodial parent), and health insurance and preschool programs for all children. Barbara R. Bergman, *Saving Our Children from Poverty: What the United States Can Learn from France* (Sage 1996).

¹⁶² Six, or even three, months of paid leave would be better for children and their new parents. But six weeks should be the absolute minimum.

¹⁶³ Sylvia Ann Hewlett and Cornel West, *The War Against Parents: What We Can Do for America's Beleaguered Moms and Dads* 233-34 (Houghton Mifflin 1998) (suggesting that workers whose employers do not offer paid leave be covered by disability insurance or social security); Becker, Bowman, and Torrey, *Feminist Jurisprudence* at 890-91 (cited in note 22) (suggesting use of unemployment insurance system). For a general discussion of the male norms throughout the unemployment insurance system, see Deborah Maranville, *Feminist Theory and Legal Practice: A Case Study on Unemployment Compensation Benefits and the Male Norm*, 43 *Hastings L J* 1081 (1992).

¹⁶⁴ The Family and Medical Leave Act, 29 USC §§ 2601, 2611, 2612, 2614 (1994), provides for only *unpaid* caretaking leave of up to twelve weeks at workplaces with 50 or more employees (within 75 miles of the worksite). For a discussion of the inadequacies of this legislation, see Kittay, *Love's Labor* at 138-39 (cited in note 136) (noting that single parents cannot afford unpaid leave, though they are likely to have the most difficulty combining wage work and caretaking, and that most Americans work for employers with fewer than fifty employees).

¹⁶⁵ Juliet B. Schor, *The Overworked American: The Unexpected Decline of Leisure* (Basic Books 1993). Working hours may have leveled off in the 1990s. See *Is Leisure Time Really Shrinking?*, USA Today 1A (September 9, 1999) (reporting results of Harris poll).

members of the working class and professionals, the married and the single.¹⁶⁶ In her book on this issue, Juliet Schor notes that on a yearly basis, manufacturing employees in the United States work “320 more hours — the equivalent of over two months — than their counterparts in West Germany or France.”¹⁶⁷

The combination of women’s increased labor force participation and increasing hours of wage work for most workers has had created enormous pressures on parents, particularly mothers (who continue to do most of the housework and caretaking) and children.¹⁶⁸

Through most of American history, hours of work have been a political issue. Schor reports, for example, that “[t]hroughout the nineteenth century, and well into the twentieth, the reduction of worktime was one of the nation’s most pressing social issues.”¹⁶⁹ We need to return this issue to the agenda and consider whether hours limitations are again necessary,¹⁷⁰ this time for professionals as well as blue-collar workers.

3. *Encourage Affirmative Action for Women and People of Color by Public and Private Employers.*

Affirmative action for women and people of color is the only effective remedy for patriarchal biases favoring white men and deeply (subtly) embedded in cultural values and measures of merit, whether subjective or objective.¹⁷¹ Recent Supreme Court

¹⁶⁶ Schor, *Overworked American* at 5 (cited in note 165).

¹⁶⁷ *Id.* at 2.

¹⁶⁸ *Id.* at 11–12.

¹⁶⁹ *Id.* at 3. Schor goes on to note that during this time, “[e]mployers and workers fought about the length of the working day, social activists delivered lectures, academics wrote treatises, courts handed down decisions, and government legislated hours of work.” *Id.* at 4.

¹⁷⁰ See Schor, *Overworked American* at 3 (noting that issue “has been off the agenda, a nonchoice, a hidden trade-off”).

¹⁷¹ On affirmative action in general, see William G. Bowen and Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* (Princeton 1998) (demonstrating in the context of affirmative action admissions to highly-selective colleges and universities, consistency of merit and affirmative-action policies and also discussing affirmative-action admittees’ post-graduation involvement as community leaders); Charles R. Lawrence III and Mari J. Matsuda, eds, *We Won’t Go Back: Making the Case for Affirmative Action* (Houghton Mifflin 1997) (collection of essays discussing need for affirmative action); Susan Sturm and Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 Cal L Rev 953 (1996) (criticizing test-based numerical rankings used in selecting candidates in many settings as arbitrary and stressing the many non-merit criteria (other than race) used in selection processes without controversy).

cases, however, raise serious questions about the constitutionality of such policies when adopted by state actors.¹⁷²

4. *Redistribute Income.*

Market values in a patriarchal culture reflect patriarchal values. High-paying jobs — surgeons, chief executive officers, engineers, etc. — are jobs that require “masculine” skills and are held disproportionately by men. Jobs requiring “feminine skills” — teaching children, nursing, caretaking, domestic work, etc. — are disproportionately performed by women and tend to pay low or no wages. Of course, these differentials seem “natural,” based on skill and difficulty. But our notions of skill and difficulty are shaped by patriarchal values. We tend to think that anyone can caretake and almost anyone can teach young children. Having taught both first grade and law school I would attest that teaching first grade is far more difficult and requires a much greater degree of skill at teaching as well as more intensive emotional involvement. Yet, as a teacher in a law school, I am paid about five times as much as a first-grade teacher and have about a billion times as much status.

This problem — our tendency to undervalue jobs held disproportionately by women — is exacerbated when jobs are held by women of color. And caretaking and domestic jobs are held disproportionately by women of color. Indeed, it is disproportionately women of color who care for the dependents and homes of elite women, particularly elite working women.

Income redistribution can counter the tendency to believe that market valuations accurately reflect a person’s worth and contributions to society. Income redistribution can also result in a more just distribution of resources than that which the (patriarchal) market can produce.

5. *Adopt a Comparable Worth Standard for Pay Equity.*

Because many women and men continue to work in jobs held almost entirely by women or men at their workplace, and because the market values male skills and attributes more than women’s, valuation of jobs under a comparable worth standard is a neces-

¹⁷² See, for example, *Adarand Constructors, Inc v Peña*, 515 US 200 (1995) (holding that congressionally-adopted affirmative action plan for contractors violates the Constitution); *City of Richmond v J.A. Croson Co*, 488 US 469 (1989) (striking affirmative action plan adopted by majority African-American city council for those contracting with the city; plan struck though 50 percent of the population of the city was black and over 99 percent of the city’s prime construction contracts had been awarded to non minority businesses in the past).

sary step towards economic equity for most working women. Under a comparable worth standard, jobs are compared and wages set in light of valuations of job worth that tend to be more equitable than pure-market valuations.¹⁷³ A push for a comparable worth standard is gaining momentum in the United States. The AFL-CIO plans to introduce pay-equity (comparable worth) legislation in 24 states this year.¹⁷⁴ Democrats in Congress are working "to get the ball rolling on a federal level" as we approach the presidential election.¹⁷⁵

6. *Grant Rights, Particularly the Right to Marry, to Lesbians and Gay Men.*

Gay men and lesbians need rights in a number of areas. Although some states and localities have laws forbidding discrimination in employment, education, housing, and public accommodations on the basis of sexual orientation, such protections are absent in much of the United States.¹⁷⁶ Gay men and lesbians are not covered by the important federal bans on discrimination in these areas.¹⁷⁷

Gay men and lesbians need many rights in the family law area. They are not allowed to marry anywhere in the United

¹⁷³ Currently, federal law requires only that women and men receive equal pay for equal work under the Equal Pay Act of 1963, 29 USC § 206(d) (1994). Under a comparable worth standard, employers must pay the same wages for different jobs if the jobs are comparable in terms of skill, effort, responsibility, and other factors under some formal measurement system. Comparable worth would provide a remedy for some bias in valuing the work of women. See Mary Becker, *Barriers Facing Women in the Wage-Labor Market and the Need for Additional Remedies: A Reply to Fischel and Lazear*, 53 U Chi L Rev 934, 942-43 (1986).

Even a comparable worth standard will not eliminate patriarchal values from job evaluations, however. Comparable worth uses preexisting methods of job evaluation, so that it simply applies to women's jobs the "same values and criteria that have been devised to rate traditionally male jobs." See Sara Evans and Barbara Nelson, *Wage Justice: Comparable Worth and the Paradox of Technocratic Reform* 170 (Chicago 1989) (analyzing data from Minnesota, where a comparable worth standard has been in place for state employees for some time). Despite this problem, researchers studying comparable worth for state employees in Minnesota conclude that it "has provided resources and significantly increase[d] the capacity for autonomy and independence of women and minorities at the lowest end of the pay scale." *Id.* at 171.

The United Nations Convention on the Elimination of All Forms of Discrimination Against Women, Dec 18, 1979, GA Res 34/180, UN GAOR, 34th Sess, Supp No 46, at 193, UN Doc A/34/46 (1980), reprinted in 19 ILM 33 (1980) ("CEDAW"), requires a comparable worth standard for pay equity. See CEDAW Art 11.1(d). The United States has yet to ratify the convention. See, for example, *U.N. Women's Rights Convention 10 Years Old, Gets Mixed Review*, NY Times A2 (Jan 24, 1990).

¹⁷⁴ Judy Mann, *Waiting for the Equal-Pay Ship to Dock*, Wash Post C15 (Mar 3, 1999).

¹⁷⁵ *Id.*

¹⁷⁶ See, for example, William H. Rubenstein, *Sexual Orientation and the Law* 431-32 (West 2d ed 1997) (describing private employment).

¹⁷⁷ *Id.*

States.¹⁷⁸ Gay men and lesbians have riskier links with their children because of judicial bias in custody and visitation decisions.¹⁷⁹ When gay or lesbian couples want to adopt a child or one partner has a child and the other partner wants to adopt it, they are often unable to forge the legal links between both parents and the child that heterosexual parents take for granted.¹⁸⁰ The benefits employers routinely offer to the families of heterosexual employees are typically unavailable to the families of gay and lesbian employees.¹⁸¹

Rights such as these, particularly the right to marry, challenge the dichotomy of masculinity and femininity,¹⁸² and give women the ability to choose more equitable intimate relationships.¹⁸³

7. *Change Rape Standards and Create New Incentive Structures for Prosecutors to Protect Female Sexual Agency.*

In a culture committed to the notion that women (at least most women most of the time), like men (at least most men most of the time), should have sex only if they desire it, rape would include situations in which the woman says “no” but is ignored.¹⁸⁴

¹⁷⁸ See, for example, Weisberg and Appleton, *Modern Family Law* at 170–87 (cited in note 152) (discussing same sex marriage issue). In *Baehr v Lewin*, 852 P2d 44 (Hawaii 1993), the Hawaiian Supreme Court held that a state’s denial of marriage to same-sex couples violated the ban on sex discrimination in the state’s constitution. The court remanded to give the state an opportunity to establish that the discriminatory policy was justified by compelling governmental interests. On remand, the trial court held that the state failed to meet this standard and held the policy unconstitutional. *Baehr v Miike*, 1996 WL 694235 (Hawaii Cir Ct). But before the Supreme Court issued a final ruling on the appeal of this decision, the voters by referendum amended the Constitution to allow the legislature to limit marriage to heterosexuals. See Sam Howe Verhovek, *The 1998 Elections: The States — Initiatives; From Same-Sex Marriages to Gambling, Voters Speak*, NY Times B1 (Nov 4, 1998).

¹⁷⁹ See, for example, Weisberg and Appleton, *Modern Family Law* at 826–32 (cited in note 152) (discussing problems gay or lesbian parents face in custody battles with heterosexual ex-spouses).

¹⁸⁰ See *id.* at 1186–92 (discussing problems same-sex couples have in obtaining a second-parent adoption).

¹⁸¹ Even when available, the rights are often less valuable. For example, when a company or governmental entity offers domestic partnership benefits to its employees, those rights typically do not include health insurance or other rights for children not legally linked to the employee partner. And the employee partner, unlike the heterosexual employee, must pay income tax on the value of the benefit, such as health insurance, given the employee’s partner. 28 USC §§ 105–06 (1994) (employee not subject to income taxation for health insurance coverage provided by employer for employee’s partner only if they are married).

¹⁸² See Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 NYU L Rev 197 (1994).

¹⁸³ Becker, 8 UCLA Women’s L J at 165 (cited in note 38).

¹⁸⁴ Susan Estrich, *Real Rape: How the Legal System Victimized Women Who Say No* 100–04 (Harvard 1987) (arguing that “no” should mean “no”); Patricia J. Falk, *Rape by*

And incentives for public prosecutors would be structured so as to encourage the regular prosecution of at least some non-stranger and marital rapes even though conviction might be uncertain.¹⁸⁵

8. *End Domestic Violence as We Have Known It.*

Ending the cycle of violence and control in abusive relationships requires changes in many areas, including better safety nets for abused women and their children, long-term housing and education programs, and programs for abusers to change their patterns of intimate interaction combined with serious criminal and other penalties for domestic violence.¹⁸⁶

9. *Reform Campaign Finance.*

Because of their many advantages in campaigning and fundraising, incumbents win elections at a high rate.¹⁸⁷ The current structure of campaign finance gives those with money greater access than others to those in elected office. To redress both these problems, campaign finance reform is desperately needed.¹⁸⁸

Fraud and Rape by Coercion, 64 Brooklyn L Rev 39 (1998) (discussing various legislative approaches to criminalizing rape by fraud and coercion and arguing that such reforms are long overdue); Mustafa T. Kasubhai, *Destabilizing Power in Rape: Why Consent Theory in Rape Law is Turned on Its Head*, 11 Wis Women's L J 37 (1996) (discussing need to apply to rape consent norms used in other situations). A caveat is necessary, however: the empirical evidence on past reform of rape statutes suggests that changing statutory language, without making other changes in the culture or institutions enforcing the statute, is unlikely to have any significant effect. See, for example, Susan Estrich, *Real Rape* at 80-91 (describing difficulty with law reform as a solution in light of its ineffectiveness in Michigan).

¹⁸⁵ Such prosecutions could generate discussions about what is rape, discussions which might influence cultural attitudes towards rape. And changing the institutional incentives in the prosecutors' office is necessary if there is to be any incentive to prosecute cases unlikely, given current cultural attitudes, to result in convictions.

¹⁸⁶ See Gill Hague and Ellen Malos, *Domestic Violence: Action for Change* (New Clarion 1993) (discussing various kinds of needed supports and programs); Ann Jones, *Next Time She'll Be Dead: Battering and How To Stop It* 199-237 (Beacon 1992) (making suggestions for change in schools, religious organizations, criminal justice system enforcement, law reform, health care system, the media, and shelters).

¹⁸⁷ See, for example, Janet Clark, *Getting There: Women in Political Office*, 515 Annals Am Acad Pol & Soc Sci 63, 74 (1991) (discussing incumbents' "tremendous electoral advantage"); Susan J. Carroll, *Women as Candidates in American Politics* 106-20 (Midland 1985) (concluding that not being incumbents is the single most effective explanation for women's limited electoral success); Lani Guinier, *Lift Every Voice: Turning a Civil Rights Setback Into a New Vision of Social Justice* 255 (Simon & Schuster 1998) (noting that re-election rate for congressional incumbents is over 90 percent).

¹⁸⁸ On campaign finance reform in general, see Marlene Nicholson, *Political Campaign Expenditure Limitations and the Unconstitutional Condition Doctrine*, 10 Hastings Const L Q 607 (1983) (summarizing doctrinal debate about constitutionality of spending limits); Marlene Nicholson, *Basic Principles or Theoretical Tangles: Analyzing the Constitutionality of Government Regulation of Campaign Finance*, 38 Case W Res L Rev 589 (1988) (arguing for spending limits to ensure equality of opportunity in participating in politics and influencing political outcomes); J. Skelly Wright, *Money and the Pollution of*

10. *Proportionate (or Semiproportionate) Representation and Other Electoral Changes.*

Changes in the electoral system could make it easier for women's interests to be represented when inconsistent with men's, facilitate the representation of other groups not at the top of the patriarchal hierarchy, and foster coalitions among such groups. More specifically, if we were to shift from winner-take-all single-member electoral districts (for legislatures and other elected boards or bodies) to proportional or semiproportional representation schemes for such entities, our elected representatives would be more representative of the electorate and more likely than our current representatives to respond to the needs of dependents, their caretakers, and other non-dominant groups.

There are many forms of proportional representation. In a common scheme, members of a legislative body or council are elected in proportion to the number of votes their party receives in the election. Thus, if 20 percent of the votes are cast for the Green party, 20 percent of the members of the legislature will be Greens.¹⁸⁹ Multi-member districts with cumulative voting, sometimes called semiproportional representation, yield similar outcomes, though structured differently.¹⁹⁰ If five people are being elected to a board, each voter has five votes which can be distributed among five candidates or clumped together to give one or more candidates multiple votes (for example, all five votes could be cast for a single candidate).¹⁹¹

Women and people of color tend to do better in proportionate or semiproportionate electoral schemes rather than winner-take-all, single-member districts. Most of the democracies in the world

Politics: Is the First Amendment an Obstacle to Political Equality, 82 Colum L Rev 609 (1982) (arguing for spending limits); J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 Yale L J 1001 (1976) (arguing for spending limits); Harold Levant, *Courts and Political Thickets*, 77 Colum L Rev 345 (1977) (arguing for spending limits); Owen Fiss, *Free Speech and Social Structure*, 71 Iowa L Rev 1405 (1986) (arguing for spending limits); Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 Colum L Rev 1281 (1994) (arguing for the constitutionality of spending limits in light of candidates' and incumbents' need to focus exorbitant amounts of time and energy on fund raising, a factor not considered by the Supreme Court in striking spending limits as unconstitutional in *Buckley v Valeo*, 424 US 1 (1979)).

¹⁸⁹ See Arend Lijphart, *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries* 153 (Yale 1984).

¹⁹⁰ Lani Guinier, *The Tyranny of the Majority: Fundamental Fairness in Representative Democracy* 122 (Free Press 1994).

¹⁹¹ *Id.*

have some such scheme.¹⁹² Only the very oldest democracies (Great Britain, the United States, and Canada) retain electoral systems most of the world considers archaic.¹⁹³

Many of these policy changes are politically unimaginable today. We should therefore begin by focusing on changes to our electoral system: campaign finance reform and structural changes to our electoral system. Ideally, these would occur simultaneously.

I do not discuss campaign finance reform in any detail for two reasons. Reform of campaign finance is a widely understood (if controversial) notion. Moreover, the links between group-based inequalities and campaign finance reform are fairly obvious. Women, African Americans, Latinos and other disproportionately poor groups near the bottom of the social structure have less political power in an electoral system in which voice and power can be purchased than they would in a system with public financing of campaigns, stringent spending limits, and free media time for candidates with a certain level of popular support.

I do, however, discuss structural electoral changes in detail below. These changes are not widely understood. More importantly, the links between our electoral structure and group-based inequalities are far from obvious, and these too are explored in the next section.

IV. TOWARDS A LESS PATRIARCHAL DEMOCRACY

If our goal is greater equality between women and men, we must move towards a less patriarchal culture, one which does a better job of meeting women's needs and valuing feminine traits that are valuable as well as meeting the needs and valuing the traits of other non-dominant groups. Each of us can challenge patriarchy in our own lives and relationships on a daily level. But we also need systemic change.

¹⁹² See, for example, Lijphart, *Democracies* at 152 (cited in note 189) (showing that of the twenty-two democracies studied, most have semiproportional or proportional representation schemes).

¹⁹³ Lani Guinier, *Lift Every Voice* at 256 (cited in note 187) (noting that the American electoral system has been referred to as "a fossil, an outdated historical legacy" and "the museum of democracy"); id at 258 (noting that democracies younger than ours have some form of proportional representation); Douglas Amy, *Real Choices, New Voices: The Case for Proportional Representation Elections in the United States* (Columbia 1993) (noting that survey of sixteen Western democracies reveals that of the four democracies with the lowest percentages of women in the lower house of the national legislature, three are Great Britain, Canada, and the United States, all of which have winner-take-all electoral schemes).

Systemic change requires that we turn from equality norms and court enforcement to ways in which the political arena can be structured so as to be more responsive to “traditionally underrepresented groups, including women, gays and lesbians, environmentalists, working-class and poor people, and racial or ethnic minorities.”¹⁹⁴ Large legislative bodies allow for many people with diverse backgrounds, experiences, and perspectives to deliberate about and enact legislation.¹⁹⁵ Unfortunately, most of the members of our legislative bodies are white men; more diverse legislatures would at least have the potential to do a better job of serving the needs and valuing the contributions of other groups.¹⁹⁶

I suggest four kinds of changes in addition to campaign finance reform.¹⁹⁷ First, I suggest proportionate or semiproportionate representation schemes for all possible levels of representation other than the United States Senate to facilitate the building of coalitions between women and other non-dominant groups and provide greater voice to minority (that is, non-dominant) views. Second, I recommend votes for children, vested in their custodial parents, to give greater weight to the needs of these dependents. Third, I suggest changes to increase the number of poor (undereducated) people who vote. Fourth and finally, I propose proportional or semiproportional representation for the Senate, a proposal which would probably require a constitutional amendment.

¹⁹⁴ Guinier, *Lift Every Voice* at 264 (cited in note 187).

¹⁹⁵ Jeremy Waldron, *The Dignity of Legislation*, 54 Md L Rev 633, 635 (1995).

¹⁹⁶ For discussions of how law contributes to the undervaluation of women's labor, see Silbaugh, 91 Nw U L Rev 1 (cited in note 4); Katharine Silbaugh, *Commodification and Women's Household Labor*, 9 Yale J L & Feminism 81 (1997); Katharine Silbaugh, *Marriage Contracts and the Family Economy*, 93 Nw U L Rev 65 (1998); Nancy Staudt, *Taxing Housework*, 84 Georgetown L J 1571 (1996).

¹⁹⁷ See notes 187–88 and accompanying text.

A. Proportionate or Semiproportionate Representation

Disproportionately, those in elective office today are white and male:

	% Population	% House ¹⁹⁸	% Senate
Non-Hispanic white men	35.54	77.88	88
Women of all colors	51.05	13.36	9
African Americans	12.6	8.53	0
Hispanic Americans	10.6	4.15	0
Asian Americans ¹⁹⁹	3.75	0.69	2
Native Americans ²⁰⁰	0.87	0	1 ²⁰¹

We should see these numbers as problems,²⁰² particularly in light of the fact that all congressional elections and most other elections in this country are based on winner-take-all single-member districts, though such districts are archaic,²⁰³ inappropriate for a country with a non-homogeneous population,²⁰⁴ and are not constitutionally required.²⁰⁵ Winner-take-all single-

¹⁹⁸ House and Senate statistics are based on Charles Pope, *New Congress Is Older, More Politically Seasoned*, 57 Cong Wkly Rep 60 (Jan 9, 1999), which reports the numbers of women and minorities in the House and Senate in January 1999, after the 1998 elections, but when there was one vacancy in the house, so that the total number of representatives was 434 rather than 435 voting members.

¹⁹⁹ Including Americans who have descended from Pacific Islanders.

²⁰⁰ Including Eskimo and Aleut peoples.

²⁰¹ The numbers for African Americans, Hispanic Americans, and Asian Americans include women and men in the population column and the House column. (There are no women of color in the Senate.) Also, the other categories are not mutually exclusive in the population column: Asian Americans may also be African Americans. Column totals can therefore exceed 100 percent for the population and House columns. Population data is based on numbers in the U.S. Department of Commerce, Economics and Statistics Administration, *Statistical Abstract of the United States 1998* (tables 12 at 14, 14 at 15, 23 at 24, and 21 at 21 give the raw numbers upon which the percentages in the population are based). Data on women and minorities in the House and Senate based on Pope, 57 Cong Wkly Rep at 62 (cited in note 198).

²⁰² Representation of groups other than white men is often higher in state and other legislative bodies, but is sometimes worse. See, for example, Howe Verhovek, *Record for Women in Washington Legislature*, NY Times A18 (Feb 4, 1999) (reporting that women now constitute 40.8 percent of the Washington state legislature but only 7.9 percent of the Alabama state legislature).

²⁰³ See note 193 and accompanying text.

²⁰⁴ See note 211 and accompanying text.

²⁰⁵ The Constitution requires that two senators be elected from every state. US Const Art I, § 3 (as amended by Amend XVII). Representatives must be proportioned among the states according to "their respective numbers," i.e., according to the population of the states. US Const Art 1, § 2, cl 2. The Constitution requires that the states have "a Republican Form of Government." US Const Art IV, § 4. In addition, the Supreme Court has

member districts make it difficult for individuals with views that are in the minority to have any voice in policy: "Winner-take-all districting gives the district majority all the power."²⁰⁶ Those voters with minority views cannot form coalitions with others in other geographic areas who share similar substantive views.²⁰⁷ Not surprisingly, as Douglas Amy reports in describing a comparative study of sixteen Western democracies, of the four countries with the lowest percentages of women in the lower houses of their national legislative bodies, three have winner-take-all single-district electoral systems (Canada, Great Britain, and the United States).²⁰⁸

Single-member, winner-take-all electoral systems use geography as the basis for representation of groups identified by district borders. We inherited this system from England, where its roots are feudal: "it was the land, and not men which should be represented."²⁰⁹ Seeing interest groups as requiring division only along geographic lines might have made some sense when the republic was founded — the franchise was then limited to propertied white men.²¹⁰ Winner-take-all systems with geographic districting *can* create effective democracies in *homogeneous* populations.²¹¹ But today we have an extremely diverse population of

interpreted the Fourteenth Amendment's equal protection clause as requiring that the seats of both houses of a state legislature be apportioned by population. *Reynolds v Sims*, 377 US 533 (1964). Proportional and semiproportional representation schemes can, of course, apportion seats according to population. For discussions of the constitutionality of proportionate representation, see Guinier, *Tyranny* at 116 (cited in note 190) ("Cumulative electoral or legislative voting is clearly consistent with one person/one vote because it ensures that each voter exercises a similarly meaningful vote."); Richard Pildes and Kristen Donoghue, *Cumulative Voting in the United States*, 1995 U Chi Legal F 241, 282 ("[C]umulative voting does not violate the principle of one person, one vote; as long as each person has equal voting power, the formal number of votes per case is irrelevant to the equal-protection concerns embodied in the one person, one vote doctrine.").

²⁰⁶ Guinier, *Tyranny* at 135 (cited in note 190).

²⁰⁷ *Id.*

²⁰⁸ Amy, *Real Choices* (cited in note 193).

²⁰⁹ A.F. Pollard, *The Evolution of Parliament* 164 (Longmans, Green 2d ed 1936), quoted in Guinier, *Tyranny* at 128 (cited in note 190).

²¹⁰ Daniel Hays Lowenstein, *Election Law: Cases and Materials* 22–23 (Carolina Academic 1995) (noting that because of "cheap land and scarce labor, most white men who could not meet the property qualifications during their youth could do so by the time they had attained middle age"). See also Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and its Legacy* 220–22 (Chicago 1990) (arguing that the framers saw the major problem of democracy as the possibility that the unpropertied majority might interfere with the property rights of the propertied minority, and the latter therefore deliberately structured government to create barriers to ordinary people's participation, including multiple levels of government and rule by a distant elite; also mentioning that in general only white men of property could vote).

²¹¹ Guinier, *Lift Every Voice* at 256 (cited in note 187); Lijphart, *Democracies* at 3–4 (cited in note 189).

voters who often live in the same districts. Geographically based districting is no longer democratic.

Winner-take-all single-member districts are "drawn not by voters but by incumbent politicians and other partisans" whose purpose is not to give "voters maximum choice but the opposite: They are drawn to give elected officials maximum protection from voters."²¹²

Indeed, England is reconsidering *its* commitment to winner-take-all single-member districts. In 1997, England's Labor and Liberal Democratic Parties agreed to hold a referendum on proportional representation if they succeeded in evicting the Conservatives in the next general election.²¹³ Proportionate representation is very much on the agenda in England today, though it is not clear that there will be a referendum before the next general election.²¹⁴ The new regional parliaments for Scotland, Wales, and Northern Ireland use proportional representation.²¹⁵ Members of the new upper house of Great Britain's parliament are likely to be elected in the future using proportional representation (there will no longer be a hereditary House of Lords).²¹⁶ And proportional representation is used to elect Great Britain's representatives to the new European Parliament.²¹⁷ Proportional representation is more difficult to achieve in the lower house of parliament because that is an existing institution filled with members who have won winner-take-all single-member district elections,

²¹² Guinier, *Lift Every Voice* at 255. Guinier goes on to note that:

Indeed, the reason so few congressional districts "turn over," meaning switch party affiliation, is that the districts are drawn consciously to collect like-minded voters into geographic units. Those who dissent, who support a different candidate, are free to vote. But their dissenting votes simply don't count. The outcome is stacked every ten years when the districts are drawn in light of new census figures.

Id.

²¹³ *Labour, Liberal Democrats Agree British Constitutional Reform*, Agence France Presse, International News Section (Mar 5, 1997) (wire report).

²¹⁴ See Tom Buerkle, *Proportional Representation Wins a Vote in British Study*, Intl Herald Trib 5 (Oct 30, 1998).

²¹⁵ Toby Harnden, *Blair's Secret Peace Plan for Ulster*, Daily Telegraph 1 (Jan 10, 1998) (describing plan for Northern Ireland Assembly to be elected by proportional representation); Denis Campbell, *When X Marks the Split*, Glasgow Herald A8 (Oct 29, 1998) (noting that proportional representation is being used for the Scottish Parliament, the Welsh Assembly, and the European Parliament).

²¹⁶ Robert Shrimley and George Jones, *Cabinet Plan for Lords to Become Senate*, Daily Telegraph A1 (Jan 20, 1999).

²¹⁷ See Denis Campbell, *When X Marks the Split* (cited in note 215).

and are therefore reluctant, regardless of their party's position, to change the status quo.²¹⁸

Given the problems with winner-take-all, single-member electoral schemes, it is not surprising that democracies younger than ours have some form of proportionate representation.²¹⁹ Under a typical proportionate representation scheme, each individual votes for one party: the Greens, the Reds, the Blues, or the Oranges. If the Green Party gets 20 percent of the votes in an election for a 100-member parliament, then 20 members of the new parliament will be Greens: the top-twenty on the Green's list of candidates.²²⁰ If the Reds get 30 percent, then thirty members of parliament are the top thirty individuals on the Reds' list, and so on. In this sort of electoral scheme, it is voters, not politicians, who draw the lines around represented groups — voters do so by deciding which party to vote for.

There are numerous variations of proportionate representation.²²¹ For example, in a variation characterized as semiproportional,²²² voters have a "single transferable vote" which is used to vote for particular candidates.²²³ In such a system, the ballot contains the names of all the candidates and voters rank them in order of preference. Votes are then transferred according to certain rules to ensure that as many votes as possible count towards the election of a candidate. For example, if the Chicago metropolitan area elected 10 representatives to Congress under such a system, each voter would get a ballot with all the candidates listed and would be asked to rank them in order from 1 to 10. Two kinds of vote transfers then take place:

[F]irst, any surplus votes not needed by candidates who already have the minimum quota of votes required for election are transferred to the next highest candidates; second, the weakest candidate is eliminated and his or her votes are transferred in the same way. If necessary, these

²¹⁸ Id (noting that many think Tony Blair could never "endorse moving over to a system which could see the loss of perhaps 80 Labour MPs").

²¹⁹ See id.

²²⁰ See Lijphart, *Democracies* at 153 (cited in note 189).

²²¹ See id at 153–54.

²²² See id at 152 (Japan's single transferable vote system styled "semiproportional" representation).

²²³ Id at 153.

steps are repeated until all of the available seats are filled.²²⁴

This system ensures not only that as many voters as possible vote for a winning candidate, but also that political minorities do not scatter their votes for so many different candidates that none is elected.²²⁵ And it is voters who draw the lines around represented groups.

Cumulative voting in modified at-large systems (also called semiproportional representation²²⁶) can function in ways quite similar to proportionate representation and also allow voters to vote for particular candidates.²²⁷ Lani Guinier describes such a system:

Under a modified at-large system, each voter is given the same number of votes as open seats, and the voter may plump or cumulate her votes to reflect the intensity of her preferences. Depending on the exclusion threshold, politically cohesive minority groups are assured representation if they vote strategically. Similarly, *all* voters have the potential to form voluntary constituencies based on their own assessment of their interests. As a consequence, semiproportional systems such as cumulative voting give more voters . . . the opportunity to vote for a winning candidate.²²⁸

In this semiproportional representation scheme, as in proportional representation schemes, it is voters, not politicians, who draw the lines around represented groups — voters do so by deciding which candidates to support and how many votes to cast for each.

Limited voting provides protection for minority voters similar to that in single-transferable-vote systems by giving each voter fewer votes than the number of open seats.²²⁹ For example, voters might be given only two votes in electing a seven-member board.

²²⁴ Lijphart, *Democracies* at 153–54 (cited in note 189).

²²⁵ Pildes and Donoghue, 1995 U Chi Legal F at 260 (cited in note 205).

²²⁶ See note 189 and accompanying text.

²²⁷ Guinier, *Lift Every Voice* at 149 (cited in note 187).

²²⁸ *Id.*

²²⁹ *Id.* at 253.

In such a scheme, the majority cannot possibly win every seat.²³⁰ There, too, voters draw lines around represented groups.

Proportionate and semiproportionate representation schemes have occasionally been used in the United States. For example, the New York City Council was elected under a proportionate representation scheme in the 1930s and 1940s.²³¹ The Illinois House of Representatives was elected under a cumulative-voting scheme with multimember districts (semiproportionate representation) for over 110 years, ending in 1980.²³² In Illinois, each legislative district for the Illinois House elected three representatives. Each voter had three votes, and could vote for one, two, or three candidates, with her votes evenly distributed to the candidates for whom they voted. Thus, a Republican in a Democratic district (or vice versa) could use all three votes to support a single Republican candidate.²³³

These sorts of electoral systems — proportionate or semiproportionate representation — have a number of advantages. Most importantly, they facilitate the representation of traditionally underrepresented groups. For example, during Illinois's semiproportionate representation era, "women were 40 percent more likely to be represented in the Illinois House" than in Congress, and the electoral system "helped propel Illinois to the forefront of women's representation."²³⁴ Proportionate or semiproportionate representation schemes encourage more diverse candidates to run and voters to vote because their participation is more likely to matter than in a winner-take-all district.²³⁵ Candidates would be less likely, under such schemes, to engage in negative campaigning rather than to engage the issues, since they must not just defeat one specific opponent but maximize their own votes.²³⁶

Debates on policy issues can be substantively better when more options and interests are brought to the table.²³⁷ In Illinois, multi-member districts with cumulative voting created a less divided legislative body because Democrats and Republicans were

²³⁰ Id.

²³¹ Guinier, *Lift Every Voice* at 264.

²³² Id at 266.

²³³ Id.

²³⁴ Id at 268.

²³⁵ Guinier, *Lift Every Voice* at 268 (for example, in New York City, while proportionate representation was in place for the city council, there were more "energetic and public-spirited candidates" as well as more voters).

²³⁶ Id at 254–55.

²³⁷ Id (noting that in New York, proportionate representation resulted in "new, able politicians; their diverse viewpoints enabled substantive and lively debate on public policy issues.").

not so neatly divided between the city of Chicago (Democratic) and the rest of the state (mostly Republican). There were Republicans from Chicago and Democrats from downstate. As a result, there were members of the Republican caucus who shared interests with Chicago Democrats, such as improving city schools.²³⁸

Both the New York City and Illinois proportionate or semi-proportionate electoral systems were replaced by winner-take-all single-member districts, but not because either system failed the voters. In New York City, the Democratic Party leadership "resented its loss of control over the nomination process and the fact that formidable third-party candidates were elected from areas that in a winner-take-all system would have been Democratic strongholds."²³⁹ To repeal the system, Democratic Party leaders spent over eight times as much as proponents and "capitalized on the fear of communism," characterizing the proportional representation as undemocratic and "a threat to the two party system" essential to democracy in the United States.²⁴⁰ It is less clear why the Illinois system, which had lasted for over 110 years, was repealed. Guinier reports that the 1980 repeal was "part of a budget-cutting proposal to eliminate fifty-nine state representatives."²⁴¹

In Chilton County, Alabama, cumulative voting in multi-member districts was adopted to remedy a possible violation of the Voting Rights Act.²⁴² The new system did increase African American representation: without any cross-over votes from whites, an African American was elected to the County Commission for the first time because African American voters were able to give multiple votes to an African American candidate.²⁴³ And minority representation resulted in substantive changes making the distribution of services more equitable across minority and non-minority communities.²⁴⁴

A study of the Chilton county experience concludes that "since cumulative voting began, groups that previously had not been represented — blacks, Republicans, and women — have been elected in significant numbers to both the County Commis-

²³⁸ Id at 266.

²³⁹ Guinier, *Lift Every Voice* at 264.

²⁴⁰ Id at 265.

²⁴¹ Id at 266. It seems, however, at least possible that some supporters of repeal might have had more political reasons.

²⁴² Pildes and Donoghue, 1995 U Chi Legal F at 260 (cited in note 205).

²⁴³ Id at 272-73.

²⁴⁴ Id at 277-81.

sion and the Board of Education.²⁴⁵ In spite of these results, and the fact that the system worked relatively smoothly,²⁴⁶ the people in Chilton County strongly dislike the cumulative voting system because it is widely seen as unconstitutional and inconsistent with the principle of one person one vote.²⁴⁷

The standard concern with proportional and semiproportional representation systems is fear of balkanization. Such schemes can result in unstable parliamentary governments and confer great power on extremist groups in legislative bodies, whose support is often necessary to form a government or for legislative action.²⁴⁸

It is, however, only in parliamentary systems that government falls when legislative coalitions are unstable.²⁴⁹ Further, as Guinier points out, the power of extremist groups in the legislature in a non-parliamentary system depends on *how* proportional (or semiproportional) representation is structured. Two issues are particularly important here: the threshold of support needed for a party to be included in the legislature; and whether the entire legislature, or only part of it, is elected via a proportional (or semiproportional) representation scheme rather than single-member districts.²⁵⁰ For example, Israel is often used as an example of proportional representation's potential to create instability and to give too much power to extremist groups.²⁵¹ But in Israel, a party is represented in the legislature if it has the support of just 1 percent of the population.²⁵² Germany is an example of a stable democracy with proportionate representation because it has both a "relatively high threshold for representation" (5 percent) and half the members of its legislature are elected on the basis of sin-

²⁴⁵ Id at 276.

²⁴⁶ Pildes and Donaghue, 1995 U Chi Legal F at 282-84 (cited in note 205). The authors of the study of the Chilton County experience "explored whether dislike of cumulative voting was a cover for resistance to minority political power," but "ultimately rejected this explanation." Id at 283. People did appreciate the need for minority representation, but would have preferred other solutions, such as drawing majority-black districts, to avoid the perceived unconstitutionality of cumulative voting. Id at 283-84. Ironically, cumulative voting is perceived to be "clearly constitutional," id at 284; see note 205 and accompanying text, whereas setting aside "a seat for minority officeholders" is "blatantly unconstitutional." Id at 283-84.

²⁴⁷ Id at 284-85.

²⁴⁸ Lijphart, *Democracies* at 157 (cited in note 189); Guinier, *Lift Every Voice* at 263-69 (cited in note 187).

²⁴⁹ Guinier, *Lift Every Voice* at 263.

²⁵⁰ Id at 268-69.

²⁵¹ Id.

²⁵² Id at 268.

gle-member districts and half on the basis of proportional representation.²⁵³

In sum, balkanization can be a serious threat, but would be limited in the United States because we have a President elected independent of the legislature (a non-parliamentary system). In addition, a well-designed electoral system can avoid any risk of balkanization by having high thresholds for representation together with some single-member districts.

Moreover, including a proportional representation component in an electoral scheme can actually stabilize a democracy. To the extent proportional representation encourages voter turnout, it is likely to contribute to stability. Guinier points, for example, to a 1989 study finding that “democracies with lower voter turnout levels have higher amounts of citizen turmoil and violence.”²⁵⁴ Arend Lijphart argues that Hitler’s rise is attributable to the rapid political mobilization of a large group of voters who had previously been disengaged.²⁵⁵ He concludes that proportionate representation can protect democracies from extremist takeovers by keeping more voters engaged in the political system.²⁵⁶

In recent years, “Cynthia McKinney, a former political science professor” and a Democratic member of the U.S. House of Representatives, has twice “introduced legislation to allow states to adopt proportionate and semiproportionate voting systems for congressional elections.”²⁵⁷ A proportional or semiproportional representation scheme could be designed for all legislative bodies at the state and federal level other than the United States Senate without constitutional modification.²⁵⁸

B. Votes For Children

Although children are included in counting the population for districting purposes,²⁵⁹ neither they nor their caretakers are allo-

²⁵³ Guinier, *Lift Every Voice* at 268.

²⁵⁴ *Id.* at 251.

²⁵⁵ Arend Lijphart, *Democracy in Plural Societies* (Yale 1977). In Chilton County, Alabama, cumulative voting in multi-member districts did not result in the election of extremists. Indeed, some “Chilton County observers believe cumulative voting actually tends to produce more centrist candidates — at least more centrist minority candidates — than the alternative of ‘safe’ minority districts.” Pildes and Donaghue, 1995 U Chi Legal F at 292–93 (cited in note 205).

²⁵⁶ Pildes and Donaghue, 1995 U Chi Legal F at 292–93.

²⁵⁷ Guinier, *Lift Every Voice* at 261 (cited in note 187).

²⁵⁸ See note 205.

²⁵⁹ See note 263 and accompanying text.

cated a child's vote.²⁶⁰ The needs of children and their caretakers would be better met if a vote were explicitly allocated for each child to be exercised by her or his custodial caretaker(s). Recently, Jane Rutherford,²⁶¹ along with Sylvia Ann Hewlett and Cornell West,²⁶² have supported such change. In briefly exploring this proposal, I begin by describing how children are considered in districting but not in voting, then consider the arguments for giving parents proxies for children's votes, and finally the constitutionality of such a proposal.

Children are counted for districting purposes but not for voting purposes. The Constitution requires that representatives be apportioned between the states according to their "respective numbers, counting the whole number of persons in each state, excluding Indians not taxed."²⁶³ The Supreme Court has adopted a similar rule for representation at the state level in an interpretation of the Equal Protection clause of the Fourteenth Amendment.²⁶⁴ Thus, for federal and state legislatures (other than the United States Senate²⁶⁵) voters are to be divided into legislative districts in such a way that one person gets one vote, meaning that each district for any specific legislative body should be roughly the same size.

The question arises, however, whether size should be measured by voters (adults who can vote) or population (legal residents, including legally resident adults who cannot vote, and children). The Constitution does not supply a clear answer.²⁶⁶ Although the Supreme Court has held that districts may be based on the number of voters rather than the number of people in the population, it has indicated a preference for districting based on

²⁶⁰ See US Const Art I, § 2 (setting 25 as minimum age for state representative); US Const Art I, § 3 (requiring that a Senator be 30 years or older); US Const Art II, § 1 (setting 35 as minimum age for President); US Const Amend XXVI (giving citizens 18 and older the vote). There is nothing in the Constitution giving votes to parents. Similar requirements exist at state levels. See, for example, Jane Rutherford, *One Child, One Vote: Proxies for Parents*, 82 Minn L Rev 1463, 1465 (1998) (noting that children cannot vote nor can anyone else vote on their behalf).

²⁶¹ Rutherford, 82 Minn L Rev at 1465 (cited in note 260) (arguing for giving parents proxies to vote for children).

²⁶² Hewlett and West, *War Against Parents* at 240–41 (cited in note 163).

²⁶³ See US Const Art I, § 2 (as amended by Amend XIV).

²⁶⁴ *Reynolds v Sims*, 377 US 533 (1964).

²⁶⁵ Representation in the Senate is *not* based on population but on the Constitutional prescription that each state, regardless of size, be represented in the Senate by two senators. US Const Art I, § 3, cl 1 (as amended by Amend XVII).

²⁶⁶ See note 205 and accompanying text.

population.²⁶⁷ Population is used in the allocation of congressional districts, so children are currently counted and comprise 26 percent of the average congressional district.²⁶⁸ Population is almost always used in allocating other districts at the state and local level as well: "population is nearly the universal basis for districting in the United States."²⁶⁹

This means that districts have fewer residents who can vote when they contain many non-voters, such as children and non-citizens.²⁷⁰ In a district with many children or other non-voters, a vote counts for more.²⁷¹ But voters who do not live in households with children often have interests that conflict with those of children and their caretakers. For example, those without children at home may be less interested in adequate funding of public education, whereas many parents and children will have good reason to favor adequate school funding.

As Rutherford has argued, the basic problem with this scheme is vote dilution. The one person, one vote rule is designed to guard against vote dilution which would occur were a state able to give more weight to some citizens' views than to others.²⁷² Yet without proxies for parents, "that is precisely what happens to parents."²⁷³ In the average congressional district, parents and children are 66 percent of the people in the district (and are all counted for districting purposes), but exercise only 54 percent of the votes.²⁷⁴ People living in households without children comprise 34 percent of the population in the average congressional district but enjoy 46 percent of the votes. On a household basis, households without children have 140 percent "of the voting power of households with children."²⁷⁵ And part of the voting power enjoyed by households without children is the result of living near households with children.

Rutherford points out that a household with two adults has the same amount of political weight — the same amount of repre-

²⁶⁷ *Burns v Richardson*, 384 US 73 (1966). In *Garza v County of Los Angeles*, 918 F2d 763 (9th Cir 1990), the Ninth Circuit determined that under the applicable statute for congressional districts, children and resident aliens should be included in the count for districting purposes.

²⁶⁸ Rutherford, 82 Minn L Rev at 1465 (cited in note 260).

²⁶⁹ Lowenstein, *Election Law* at 118 (cited in note 210).

²⁷⁰ For the proposition that children and non-citizens do not vote, see *id.*

²⁷¹ *Id.*

²⁷² *Reynolds*, 377 US at 562.

²⁷³ Rutherford, 82 Minn L Rev at 1512 (cited in note 260).

²⁷⁴ *Id.* at 1466.

²⁷⁵ *Id.* at 1512 n 211.

sentation — as a household with two adults and two children.²⁷⁶ In the first household, every member of the household has a vote. In the second household, half do *not* have votes. And the voters, if they are good parents, “will essentially split their votes . . . so they represent their needs and the needs of their children.”²⁷⁷ Giving parents proxies to vote for children redresses this problem, and evens out political weight on a *per capita* basis, the goal of the one person, one vote rule.²⁷⁸

Current poverty rates are the strongest indicator of the need for such an adjustment in political power. As Rutherford has pointed out, “fifty years ago it was the elderly who were poor.”²⁷⁹ Social Security and Medicare have eliminated most poverty among the elderly.²⁸⁰ Although these are expensive programs, they have survived thus far because of the political power of the elderly.

Today, it is disproportionately children (and their caretakers, particularly in single-parent families) who are poor. Indeed, welfare reform has exacerbated problems for many poor children.²⁸¹ Children have no direct political power to use in pressing for effective governmental programs lowering their poverty rates. And their indirect power — through their parents — is diluted because it is folded into the parents’ own vote. It is not simply that children have needs which we should meet out of empathy and fellow feeling, though that is true. Children are a public good benefiting the entire community: we all benefit from having younger generations of workers, particularly as we age.²⁸² And as Rutherford has noted, apart from their role as future workers, children “either enrich or debase our communal lives in childhood.”²⁸³

Sylvia Ann Hewlett and Cornell West argue that parent or guardian should be able to cast a vote “on behalf of a child younger than eighteen” because “today’s elections will affect today’s children well into maturity, and they should have an opportunity to influence that future, if only through their parents.”²⁸⁴

²⁷⁶ Id at 1512.

²⁷⁷ Rutherford, 82 Minn L Rev at 1512.

²⁷⁸ Id.

²⁷⁹ Id at 1465.

²⁸⁰ Id.

²⁸¹ Kittay, *Love’s Labor* at 117–18 (cited in note 136).

²⁸² Rutherford, 82 Minn L Rev at 1518.

²⁸³ Id.

²⁸⁴ Hewlett and West, *War Against Parents* at 240 (cited in note 163).

They also stress the importance of strengthening American families and the ability of parents to care for their children.²⁸⁵

Rutherford notes that, in most instances, the child's proxy would be held by his or her custodial parent(s) or other custodial caretaker.²⁸⁶ This person will ordinarily be familiar with the child's needs and circumstances, be accessible to the child, and be emotionally bonded with the child in ways likely to promote "caring, sympathy, and empathy," and to create a "shared venture with the child."²⁸⁷ A custodial caretaker will not always be the best person to represent the child's interest in the electoral system, but a rule giving a proxy to that person is likely to yield the right result most of the time and would be easy to apply.

Although giving parents proxy votes for children is a novel idea and therefore seems strange, it may well be constitutional. There is no constitutional provision banning such an electoral structure and no constitutional case definitively indicating that it would be impermissible. It is certainly consistent with one reading of the one person, one vote rule, as noted throughout this section.²⁸⁸

C. Policies Encouraging the (Undereducated) Poor to Vote.

In the last Presidential election, 1996, only 49 percent of voters voted.²⁸⁹ The vast majority of voters — 76 percent — either voted against President Clinton or did not vote.²⁹⁰ Non-voting is a widespread phenomenon and not by any means limited to members of poor and minority populations. American voting rates are low relative to other countries today and low when compared to America in the past. For example, Daniel Lowenstein's 1995 textbook on voting rights reports that the United States (at 53 percent of eligible adults voting) is nineteenth out of twenty industrialized democracies (compare, for example, Belgium where 94 percent of eligible adults vote; Austria 92 percent; Australia 90 percent; West Germany 87 percent; Italy 84 percent; the United Kingdom 74 percent; and Canada 72 percent).²⁹¹ The United States is a full 15 percent below Japan, the eighteenth-ranked

²⁸⁵ Id at 230–58.

²⁸⁶ Rutherford, 82 Minn L Rev at 1503–10.

²⁸⁷ Id at 1503.

²⁸⁸ Id at 1514–17.

²⁸⁹ Guinier, *Lift Every Voice* at 253 (cited in note 187).

²⁹⁰ Id.

²⁹¹ Lowenstein, *Election Law* at 42 (cited in note 210).

country.²⁹² Only Switzerland, at 49 percent, has a lower voting participation rate.²⁹³

Current United States participation rates are also low relative to earlier eras. Between 1840 and 1896, 78 percent of eligible American voters turned out to vote in presidential elections.²⁹⁴ This high participation period was followed by a sharp decrease during the early decades of the twentieth century, particularly in the South where African Americans were not allowed to vote and a single party (Democratic) system discouraged whites from voting.²⁹⁵ Rates in the South increased with the registration of African Americans during the civil rights years, but rates in the North declined sharply after 1960.²⁹⁶

Although high voter participation rates do not guarantee, in Lani Guinier's words, "a very full democracy,"²⁹⁷ these nonparticipation rates surely suggest that our current political system is failing as a democracy in fundamental ways. Electoral system reforms shifting from winner-take-all single-member districts to proportional and semiproportional representation systems should increase levels of meaningful political participation by giving many voters who now feel they have no say in the system a greater stake and a better and broader range of candidates.²⁹⁸

The problem is not, however, simply that few people vote. The problem is also that poor people²⁹⁹ and racial minorities³⁰⁰ are particularly unlikely to vote. In the United States, level of education is the socioeconomic indicator with the greatest predictive power for voting.³⁰¹ (Those with more education tend to vote more than those with less education.) But education is associated with both racial status and poverty, with the result that the (under-educated) poor are less likely to vote than the (more educated) members of higher classes and Anglos are more likely to vote than African Americans, Mexican Americans, or Puerto Rican

²⁹² Id.

²⁹³ Id.

²⁹⁴ Id.

²⁹⁵ Lowenstein, *Election Law* at 42-43.

²⁹⁶ Id.

²⁹⁷ Guinier, *Lift Every Voice* at 252.

²⁹⁸ See notes 229-38 and accompanying text.

²⁹⁹ Guinier, *Lift Every Voice* at 253.

³⁰⁰ Lowenstein, *Election Law* at 46-47.

³⁰¹ Id at 46 (reporting that older people and those who have recently moved are also less likely to vote).

Americans.³⁰² Guinier reports that participation rates for poor people have actually been declining in the 1990s.³⁰³

Part of the explanation for the failure of the (undereducated) poor to vote is likely to be "that neither party is speaking to the interests of the lower-income brackets of Americans."³⁰⁴ Again, a shift to proportional or semiproportional representation should increase participation. But policies could also be designed to encourage the poor to vote by lowering the cost of voting. The cost of voting is likely to deter most those for whom the costs are high: those who are undereducated and uninterested in politics and for whom learning about the issues and candidates is therefore most burdensome.³⁰⁵

The United States "is one of the few if not the only major democracy in the world that requires advance registration as a prerequisite to voting without the government assuming responsibility for seeing to it that all eligible people are registered."³⁰⁶ (In the United States, most registration requirements date back only to 1900 or so, and may well have been adopted to discourage "voting by immigrants, workers, and others who were regarded by some as too ignorant to vote."³⁰⁷) Ideally, the United States would eliminate registration requirements or require that government register voters, but neither of these alternatives is likely in the near future.

A 1987 study of voter turnout in light of different registration requirements in different places in the United States suggests that the single factor most likely to have the greatest effect on turnout is the ending date for registration: the shorter the period between the last registration date and the election, the less registration requirements will depress turnout.³⁰⁸ Other factors of importance include whether one can register throughout regular business hours as well as on evenings or on weekends; whether registration by mail is available for those sick or disabled or out of town; and how quickly voters are eliminated from the rolls for

³⁰² Id at 46-47 (noting that poverty is not a factor correlating to non-voting independent of education and making similar points about race).

³⁰³ Guinier, *Lift Every Voice* at 253 (cited in note 187) (in 1990, 13.8 percent of American voters came from families with incomes under \$15,000; in 1992, only 11 percent of voters came from such families; in 1994, only 7.7 percent did).

³⁰⁴ Id (quoting Curtis Gans, Director of the Committee for the Study of the American Electorate in Washington, D.C.).

³⁰⁵ Raymond E. Wolfinger and David P. Glass, *Residential Mobility and Voter Turnout*, 81 Am Pol Sci Rev 45 (1987).

³⁰⁶ Lowenstein, *Election Law* at 48-49 (cited in note 210).

³⁰⁷ Id at 49 (noting that this point is controversial among historians).

³⁰⁸ Wolfinger, 81 Am Pol Sci Rev 45 (cited in note 305).

failing to vote.³⁰⁹ Lowenstein reports that “[p]olitical scientists estimate that if all states had the most liberalized procedures of the sort that have been shown to make a difference (that is, voters can register up to election day, registration offices keep regular hours, including being open evenings or weekends, the sick, disabled, and absent can register by mail, and voters are not purged without checks to confirm that they have either died or moved), then national turnout might increase by about seven to nine percentage points.”³¹⁰

Motor Voter Registration has been adopted in a number of states and is required for federal elections.³¹¹ These reforms have not entirely solved the problem, as evidenced by the data cited earlier on turnout rates for the 1996 presidential election.³¹² There are a number of problems with the Motor Voter approach. Motor Voter laws do not focus on the area of change political scientists consider most likely to be effective: shortening the time between the last date for registration and the election.³¹³ In addition, one of the major Motor Voter reforms — making voter registration automatic or convenient for those who register for drivers’ licenses — is dramatically skewed by class, because according to 1983 data, “only 47 percent of the 36 million adults in households with incomes under \$10,000 held drivers’ licenses. But 93 percent of the 31 million adults in households with incomes over \$40,000 had licenses.”³¹⁴

Besides making it easier to register, particularly near or on election day, we could consider making voting obligatory. Both Belgium and Australia take this approach: citizens are *required* to vote.³¹⁵ Belgium and Australia are two of the three top countries in terms of voter turnout on Lowenstein’s list of twenty industrialized democracies,³¹⁶ though enforcement is lax and penalties light.³¹⁷ Other changes that might encourage higher rates of voter turnout include small financial incentives for those least

³⁰⁹ Id. But neither allowing registration by mail for all nor making available “deputy registrars” who can register people in offices, shops, or their homes, increases turnout. Lowenstein, *Election Law* at 49–50.

³¹⁰ Lowenstein, *Election Law* at 50.

³¹¹ On state Motor Voter plans prior to 1988, see Frances Fox Piven and Richard A. Cloward, *Why Americans Don’t Vote* 220–21 (Pantheon 1989). On the federal law, enacted in 1993, see Lowenstein, *Election Law* at 50–53.

³¹² See note 289 and accompanying text.

³¹³ See note 308 and accompanying text.

³¹⁴ Piven, *Why Americans Don’t Vote* at 222 (cited in note 314).

³¹⁵ Lowenstein, *Election Law* at 53 (cited in note 210).

³¹⁶ See note 291 and accompanying text.

³¹⁷ Lowenstein, *Election Law* at 33 n 2.

likely to vote or for all voters, paid time off from work to vote, and elections held on Sundays or holidays.

The dramatic differences between United States voting rates and those of other countries suggest that changes could increase participation levels. Two changes — shifting from winner-take-all single-member districts to proportional or semiproportional representation *and* easing registration, particularly near or on election day — would significantly increase the rates at which Americans vote.

D. Semiproportional Representation in the Senate.

The Constitution requires two senators, each with one vote, from each state. Currently, each senator from each state is elected in a winner-take-all single-member-district election. Many changes are imaginable, and I discuss three here.

Without constitutional amendment, senate elections could be reorganized to allow cumulative voting, though both senators would be up for election at the same time. Each voter would have two votes and could cast one for each of two candidates or could cast both for a single candidate. Under such a scheme, each state would be a multi-member district for the Senate with cumulative voting. Alternatively, the Constitution could be amended to provide for regional election of senators with multi-member districts and cumulative voting (as opposed to the current constitutionally required form of representation: two senators from each state).³¹⁸

A third, and more radical, option would require each state to send at least one woman to the Senate. Given the current constitutional standard for sex discrimination, this would violate the Equal Protection clause of the Fourteenth Amendment as interpreted by the Supreme Court and would therefore require a constitutional amendment. Elsewhere, I have suggested amending the Constitution with a new Equal Rights Amendment (“ERA”)³¹⁹:

³¹⁸ See note 205.

³¹⁹ The ERA has already had two incarnations, though it has yet to be adopted. The initial version, introduced yearly into Congress from 1923 to 1969, provided:

Men and women shall have equal rights throughout the United States and in every place subject to its jurisdiction. Congress shall have power to enforce this article by appropriate legislation.

Becker, Bowman, and Torrey, *Feminist Jurisprudence* at 22 (cited in note 22).

In 1970, a new version of ERA was introduced into Congress:

Section 1. Neither any state nor the federal government shall deprive any woman or man of life, liberty, or property, without due process of law; nor deny to any woman or man within its jurisdiction the equal protection of the laws.

Section 2. Each state shall have at least one senator who is a woman. Congress shall, through appropriate legislation, establish laws to enforce this provision and may determine that it becomes effective only upon the retirement of male incumbents in the Senate.

Section 3. Congress shall have the ultimate power to enforce this Amendment and to determine its scope and meaning.³²⁰

This amendment would both (1) require that one Senator from each state be a woman; and (2) give ultimate power to determine the meaning of sex equality to the United States Congress.

Any of these three changes in the method of electing senators is likely to increase the representation of currently underrepresented groups in the Senate as well as to broaden Senators' perspectives and ideas on substantive and policy issues. In addition, either of the two initial suggestions for change, both of which involve a form of proportional or semiproportional representation, could be combined with the ERA approach, requiring that at least half the Senate be comprised of women. Of the three, I favor combining regional elections (cumulative voting for multi-member districts) with the ERA requirement of 50 percent women, since that combination seems likely to offer the greatest potential for changing the composition of the Senate in terms of race as well as sex.³²¹

Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Id at 24. This version was passed by Congress in 1971 and nearly became part of the Constitution during the 1970s. *Id.*

³²⁰ Becker, 40 *Wm & Mary L Rev* at 209 (cited in note 72).

³²¹ Given the limited number of Senate positions open in any election, even regional cumulative voting schemes with multi-member districts would not raise any significant risk of balkanization, that is, election of extremists. For example, if the Northeast formed one senate region for the election of 12 senators from Maine, New Hampshire, Connecticut, Rhode Island, Vermont, Massachusetts, and New York, the region would elect only a total of twelve senators. If elections were staggered equally every two years, only four positions would be up for election at the same time.

These changes in our voting system would not eliminate patriarchy overnight. But these changes would make it easier for additional voices to be heard in American politics. Enacting such radical changes to American electoral systems will not, of course, be easy. But it will require that we *begin* by simply discussing the problems with the current electoral system and why changes in the direction of proportional representation might be desirable.

The immediate problem is that even raising these issues for discussion in any popular forum seems impossible. Recall the furor over Lani Guinier's nomination to a Justice Department position requiring Senate confirmation early in the Clinton administration. For suggesting that American democracy might be flawed and that proportional or semiproportional representation — methods used in most of the world's democracies — might better integrate the views of those traditionally underrepresented,³²² the *Wall Street Journal* castigated her as a "Quota Queen" and "out of the mainstream."³²³ Newsweek titled a story "Crowning a Quota Queen."³²⁴ Others used "Loony Lani," the "Czarina of Cze-paratism," the "Princess of Proportionality," and "Real America's Madwoman."³²⁵ In the end, as a result of the media frenzy (and the administration's failure to launch any defense or show any backbone), Guinier's name was withdrawn by the President.³²⁶

Given this background, the initial problem with moving to a proportional or semiproportional representation system like those in place in most of the rest of the world is the difficulty of even raising the issue in the United States. It is equally difficult to raise broad issues about the social forces creating inequality in our society. In discussing patriarchy, I have tried to raise such issues, but the resistance to discussions of patriarchy is also strong. In my experience, "feminism" is far more acceptable than

³²² Her pre-nomination essays on voting and electoral systems are collected in Guinier, *Tyranny* (cited in note 190). In this book, Guinier suggests proportional or semi-proportional representation and, when necessary, supra-majority requirements be adopted as remedies for Voting Rights Act violations rather than redistricting, which tends to be drawn along racial lines. Id. at 71–118. In *Lift Every Voice* (cited in note 187), Guinier reports that only after the nomination did she consider proportional representation as anything more than a remedy for proven violations of voting rights. Id. at 269.

³²³ Guinier, *Lift Every Voice* at 36–37, 276. In Chilton County, Alabama, where cumulative voting in multi-member districts was adopted in response to a possible Voting Rights Act violation, voters considered the method unconstitutional and disliked it heartily. Perhaps their response was much like that of the press to Guinier's proposals.

³²⁴ Id. at 38.

³²⁵ Id. at 37.

³²⁶ Id. at 36–56.

any reference to “patriarchy.”³²⁷ The smallest, but most important, step is to see, and work to make others see, the key problems: (1) a social structure focused on (white) male needs and valorizing masculinity; and (2) the connections between the perpetuation of this system and our skewed electoral system.

V. CONSTITUTIONAL STANDARDS AND COURT ENFORCEMENT

Thus far, I have not discussed the possibility of challenging patriarchy by using constitutional standards interpreted by the United States Supreme Court and enforced by the lower federal and state courts. Patriarchy is far too malleable and flexible to be “caught” by any standard capable of being administered by courts. As supporters of formal equality stress, sex-based laws — even laws that arguably favor women — often contribute to women’s subordinate status and serve patriarchal goals.³²⁸ But sex-specific patriarchal rules harmful to women can be replaced by even more harmful gender-neutral legislation. For example, traditional alimony rights were sex-specific (available only to women) and based on notions of female dependency rather than on women’s contributions to the marriage partnership.³²⁹ Such laws were insulting and patriarchal in that they ignored the value of what women contributed to families. Current maintenance standards are gender-neutral and based on notions of marriage as a partnership to which the caretaking spouse makes contributions. But actual awards today tend to be for a shorter duration for long-term homemakers than those under traditional rules.³³⁰

³²⁷ Feminist friends and supporters have, for example, cautioned against the use of the word “patriarchy” when I am to give a speech or presentation, though they would never suggest that I eliminate the word “feminism.”

³²⁸ See, for example, Williams, 7 *Women’s Rts L Rep* at 178–19 (cited in note 73) (footnotes omitted):

[Using formal equality, the Court struck] down sex-based classifications that were premised on the old breadwinner-homemaker, master-dependent dichotomy inherent in the separate spheres ideology. Thus, the Supreme Court insisted that women wage-earners receive the same benefits for their families under military, social security, welfare, and worker’s compensation programs as did male wage earners; that men receive the same child care allowance when their spouses died as women did; . . . that the duty of support through alimony not be visited exclusively on husbands.

³²⁹ Becker, 40 *Wm & Mary L Rev* at 248 (cited in note 72).

³³⁰ For example, under the traditional rule, long-time homemakers were more likely to receive “permanent” alimony (lasting until death of either party or remarriage of recipient) than today, when spousal support even for many long-term homemakers is only “re-

One could fashion a standard that would ask courts to determine whether the challenged rule or policy contributes to patriarchy, but such a standard would not be judicially manageable. The problem is never one rule or practice in isolation, but how it works and what it means within the social structure. In addition, the answer would always depend on what the alternative to the challenged rule would be, a matter beyond the control, and often the knowledge, of courts.³³¹

In addition, there is the question of institutional competence. federal judges, including Supreme Court Justices, have risen to the top of a conservative and patriarchal profession.³³² Law is conservative in that what is legitimate for a judge to do is what is consistent with what has been done in the past. Litigation is patriarchal in that it valorizes qualities and attributes culturally defined as male: aggression, toughness, and other warrior qualities. I doubt whether many of those who have risen to the federal bench in such a system could identify as patriarchal (and then strike as unconstitutional) rules and practices that overvalue the very qualities that have contributed to their own professional success.

In light of these and other problems with relying on the courts to protect the groups at the bottom of the patriarchal hierarchy, in the end, there is nothing but politics. Indeed, reliance on courts and their definitions of constitutional notions such as equality are a great deal of the *problem*. In the United States, court-identified notions of constitutional equality shape notions of equality throughout the culture. Most Americans, without even realizing that there are alternatives, think of inequality between women and men the way the Supreme Court does. Inequality between women and men is an isolated question considered in the context of a single event, rule, or practice. It is considered in isolation from race, class, other inequalities, and broader social patterns and expectations. Whether the challenged event, rule or

habilitative," i.e., short term and designed only to help with the transition from homemaker to wage worker. See Mary Becker, *Prince Charming: Abstract Equality*, 1987 S Ct Rev 201, 222 (describing change and its associated with acceptance of notions of formal equality).

³³¹ Consider the equal protection challenges described in the Appendix under a standard requiring courts to strike the challenged rule if it is patriarchal.

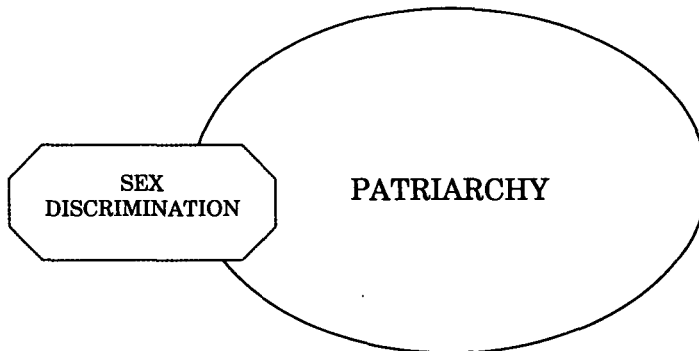
³³² Mary Becker, *Conservative Free Speech and the Uneasy Case for Judicial Review*, 64 U Colo L Rev 975, 987-90 (1993) (discussing bias in overwhelmingly male judiciary and innate conservatism of system in which consistency with precedent creates legitimacy; at the time of article, 1993, 109 out of the 110 people (99.09 percent) who had served on the Supreme Court were men). Although two of the nine justices today are women (22 percent), they are the only women ever to serve on the Court.

practice contributes to inequality between the sexes turns solely on whether it treats similarly situated individuals differently because one is a woman and the other a man.

The result of this approach to questions of inequality is that patriarchy as a social system within which rules operate — a social system that is male-centered, male-identified, male-dominated, and obsessed with power over and control of others³³³ — remains entirely invisible. Patriarchy can be challenged, but only by those who see it.

All the culture and the courts can see is sex discrimination, defined as treating differently similarly situated women and men. Patriarchy includes some, but not all, sex discrimination (by this definition) but is a much broader phenomenon, as demonstrated in Figure A.

Figure A



Patriarchy includes some sex discrimination, such as the exclusion of women from jobs deemed male despite their qualifications under the standards used for the (male) incumbents. But not all sex discrimination is part of patriarchy. Discrimination against men — that is, affirmative action for women — can be a remedy for past or continuing systemic patriarchal biases against women, such as ignoring valuable job-related qualities associated with femininity in deciding which applicants are most qualified.

A man can be the victim of sex discrimination as it has been defined by the courts: he can be treated differently from a similarly-situated woman.³³⁴ He may, for example, be drafted to serve in combat whereas a woman might be exempt from such

³³³ See note 14 and accompanying text.

³³⁴ See Appendix.

service.³³⁵ And men are, as stressed earlier, hurt by patriarchy, particularly by learning to suppress their emotions and need for human connection.³³⁶ But, as explained earlier, men cannot be patriarchally oppressed as men, as members of the group, men, because men as a group are not oppressed.³³⁷

Thus, patriarchy and sex discrimination under the current constitutional standard (as interpreted by the Court) are sets that overlap but are far from identical. Some practices are patriarchal *and* violate the Court's standard.³³⁸ But many aspects of patriarchy are *not* caught by the Court's standard.³³⁹ And the Court's standard catches some practices — such as affirmative action for women — which are not patriarchal.³⁴⁰

³³⁵ Under the constitutional standard for sex discrimination, such a policy would seem to discriminate on the basis of sex. But in *Rostker v Goldberg*, 453 US 57, 58 (1981), the Court held that women need not be subject to compulsory registration for the draft because men and women were not similarly situated with respect to their ability to serve in combat.

³³⁶ See Part I B.

³³⁷ *Id.* Men are hurt by patriarchy. But it cannot "oppress" them unless oppression means only the same thing as "hurt." If oppression refers to hierarchical relations between groups, men as such cannot be oppressed in our culture because they are on top. *Id.*

³³⁸ For example, ending child support obligations for young women at 18 but allowing young men to receive such support until 21 is both patriarchal and a violation of the Supreme Court's formal equality standard. See *Stanton v Stanton*, 421 US 7 (1975) (female plaintiff wins; Court strikes statute creating different ages of majority for young men and women).

³³⁹ For example, the Court upheld as constitutional a disability plan for state workers covering all disabilities (including those related to cosmetic surgery) except those related to pregnancy, though such a plan is patriarchal: pregnant women are assumed to be dependent on male breadwinners and hence better able to survive without support during disability than other workers. See *Geduldig v Aiello*, 417 US 484 (1974). The Court upheld the classification on the ground that the state "has an interest in distributing the available resources in such a way as to keep benefit payments at an adequate level for disabilities that are covered, rather than to cover all disabilities inadequately." *Id.* at 496. It makes no sense, however, to cover all disabilities (including those associated with cosmetic surgery) but to deny coverage for pregnancy related disabilities *unless* one assumes that the worker with a pregnancy related disability has some other means of support. Without such support, the worker disabled for pregnancy-related reasons should be the first person covered by the disability policy, because she needs money for her own survival and the survival of the new citizen dependent on her.

³⁴⁰ The Supreme Court has never decided a constitutional sex-discrimination case framed explicitly as affirmative action for women. See list and description of Supreme Court constitutional sex discrimination cases in Appendix. But some of the cases it has decided arguably involve affirmative action, yet the policies were struck without any discussion of that possibility. See, for example, *Wengler v Druggists Mutual Insurance Company*, 446 US 142 (1980); *Orr v Orr*, 440 US 268 (1979); *Califano v Goldfarb*, 430 US 199 (1977); *Weinberg v Wiesenfeld*, 420 US 636 (1975). In other cases, policies which arguably were affirmative action were upheld, again without any discussion of affirmative action. See, for example, *Heckler v Mathews*, 465 US 870 (1984); *Fiallo v Bell*, 430 US 787 (1977); *Califano v Webster*, 430 US 313 (1977); *Schlesinger v Ballard*, 419 US 498 (1975); *Kahn v Shevin*, 416 US 351 (1974).

The problem I am identifying is not simply that the Court's standard does not work to eliminate patriarchal patterns and practices. As discussed earlier in this section, no judicially enforced standard could do so. The ineffective constitutional notion of sex equality has come to dominate understandings of sex equality throughout the culture. This is a far more serious problem than its ineffectiveness.

CONCLUSION

Both formal equality and dominance analysis are empty at their core of any values that might threaten patriarchy. It is relational feminism, with its valuation of caretaking, relationships, and empathy, that has the potential to improve well-being for women, children, and men.

This essay has identified patriarchy, meaning a male-centered, male-identified, and male-dominated social system, as the source of continuing inequality between women and men. The first and most important step we can take is to step back far enough to view the big picture: the patriarchal social structure. Today, the constitutional standard is part of the problem, with its narrow idea of inequality as occurring in isolated rules or policies. Unfortunately, this notion has come to dominate popular and cultural notions of inequality. Our first task must therefore be to change the popular understanding of equality and inequality between the sexes. Our second is also cultural: to make it possible to at least criticize the current electoral structure as complicit in replicating patriarchal hierarchies.

I have also discussed some of the many legal and policy changes necessary if we are ever to see a world in which women (and men) are able to lead reasonably happy and fulfilling lives. Of particular importance are changes to provide better emotional and economic security for caretakers and their dependents and to end violence against women. As we move into the twenty-first century and a world increasingly driven, not by human needs and values but by the needs and values of a global market,³⁴¹ such changes are becoming more difficult — but also more critical for human well-being.

³⁴¹ See Juliet Schor, *The Overspent American: Upscaling, Downshifting, and the New Consumer* 172–73 (Basic Books 1998) (suggesting that Americans stop and consider whether “globalization of consumer markets isn’t proceeding too rapidly, with too little thought”; like Europeans, we should worry whether we will be able to maintain “quality of life in a world where making as much money as possible has become the reigning religion”).

APPENDIX

Listing of All Twentieth Century Equal Protection Sex-Discrimination Cases — *Reed v Reed* to the End of the Century

1. *Reed v Reed*, 404 US 71 (1971) (female plaintiff wins; Court strikes statute creating preference for male estate executors).
2. *Frontiero v Richardson*, 411 US 677 (1973) (female plaintiff wins; Court strikes rule automatically giving benefits to spouses of men, but not spouses of women, in the Air Force).
3. *Kahn v Shevin*, 416 US 351 (1974) (male plaintiff loses; upholding property tax exemption for widows).
4. *Geduldig v Aiello*, 417 US 484 (1974) (female plaintiff loses; Court holds pregnancy discrimination in state disability plan not sex discrimination).
5. *Schlesinger v Ballard*, 419 US 498 (1975) (male plaintiff loses; Court upholds rule giving women two more years in rank under military officer up-or-out policy).
6. *Taylor v Louisiana*, 419 US 522 (1975) (male plaintiff wins; Court holds that women must be included on juror rolls).
7. *Weinberg v Wiesenfeld*, 420 US 636 (1975) (male plaintiff wins; Court holds that widower must be given Social Security benefits available to the widow).
8. *Stanton v Stanton*, 421 US 7 (1975) (female plaintiff wins; Court strikes statute creating different ages of majority for young women and men).
9. *Craig v Boren*, 429 US 636 (1976) (male plaintiff wins; Court holds unconstitutional different rules on ability of young people to buy 3.2 percent beer).
10. *Califano v Goldfarb*, 430 US 199 (1977) (male plaintiff wins; Court strikes differential Social Security benefits for widows and widowers).
11. *Califano v Webster*, 430 US 313 (1977) (male plaintiff loses; Court upholds temporary provision giving women advantage in calculating Social Security benefits on retirement).
12. *Fiallo v Bell*, 430 US 787 (1977) (male plaintiff loses; Court upholds immigration rules giving mothers and their illegitimate children a more privileged status than fathers and their illegitimate children).
13. *Orr v Orr*, 440 US 268 (1979) (male plaintiff wins; Court strikes alimony statute imposing obligation only on husbands to support wives after divorce under some circumstances).

14. *Parham v Hughes*, 441 US 347 (1979) (male plaintiff loses; Court upholds statute precluding father from suing for wrongful death of child if paternity had not been established prior to child's death).
15. *Caban v Mohammed*, 441 US 380 (1979) (male plaintiff wins; Court holds that unwed father's consent is needed for adoption when he has established relationship with child).
16. *Davis v Passman*, 442 US 228 (1979) (female plaintiff wins; Court holds that congressman who refuses to hire women for staff positions discriminates on the basis of sex in violation of Constitution).
17. *Personnel Administrator of Massachusetts v Feeney*, 442 US 256 (1979) (female plaintiff loses; Court holds preference for veterans in state employment not sex discrimination).
18. *Great American Federal Savings & Loan Assn v Novotny*, 442 US 366 (1979) (male plaintiff loses; Court holds that rights created by Title VII cannot be asserted in an equal protection action under § 1985(3)).
19. *Califano v Westcott*, 443 US 76 (1979) (female plaintiff wins; Court strikes statute giving aid to low-income two-parent families when the father, but not the mother, was unemployed; Court extends program to two-parent families with unemployed mothers).
20. *Wengler v Druggists Mutual Insurance Company*, 446 US 142 (1980) (male plaintiff wins; Court strikes worker's compensation law requiring widower, but not widow, to show incapacitation or dependence in order to receive death benefits).
21. *Michael M. v Superior Court of Sonoma County*, 450 US 464 (1981) (male plaintiff loses; Court strikes statutory rape law applicable only against males).
22. *Kirchberg v Feenstra*, 450 US 455 (1981) (female plaintiff wins; Court strikes down community property law giving husband unilateral control of jointly owned marital property).
23. *Rostker v Goldberg*, 453 US 57 (1981) (male plaintiff loses; Court upholds selective service registration limited to males).
24. *Mississippi University for Women v Hogan*, 458 US 718 (1982) (male plaintiff wins; Court holds that Mississippi cannot offer a women's-only nursing school).
25. *Heckler v Mathews*, 465 US 870 (1984) (male plaintiff loses; Court upholds temporary, gender-based pension offset exception to Social Security survivor benefits).

26. *Bray v Alexandria*, 506 US 263 (1993) (female plaintiff loses; Court holds that obstruction of abortion facilities by protesters is not sex discrimination).

27. *J.E.B. v Alabama*, 511 US 127 (1994) (male plaintiff wins; Court holds unconstitutional peremptory challenges of prospective jurors based on sex (defendant's lawyer in paternity action had struck women from the jury)).

28. *United States v Virginia*, 518 US 515 (1996) (female plaintiff wins; Court holds that Virginia Military Institute cannot admit only men).

29. *Miller v Albright*, 523 US 420 (1998) (plaintiff not a male but daughter of a male; six justices uphold refusal to extend her citizenship though, had her mother been the U.S. citizen rather than her father, she would have qualified for citizenship; of the six justices voting to dismiss the claim, two held that the daughter did not have standing to raise her father's claim of sex discrimination, two held that she had standing but the sex-based discrimination was permissible because serving important governmental interests, and two held that the Court lacked the power to grant the relief requested regardless of her standing and the merits of the claim).

Female plaintiffs:	11 cases: 7 wins; 4 losses.
Male plaintiffs:	18 cases: 9 wins; 9 losses.
Total:	29 cases.